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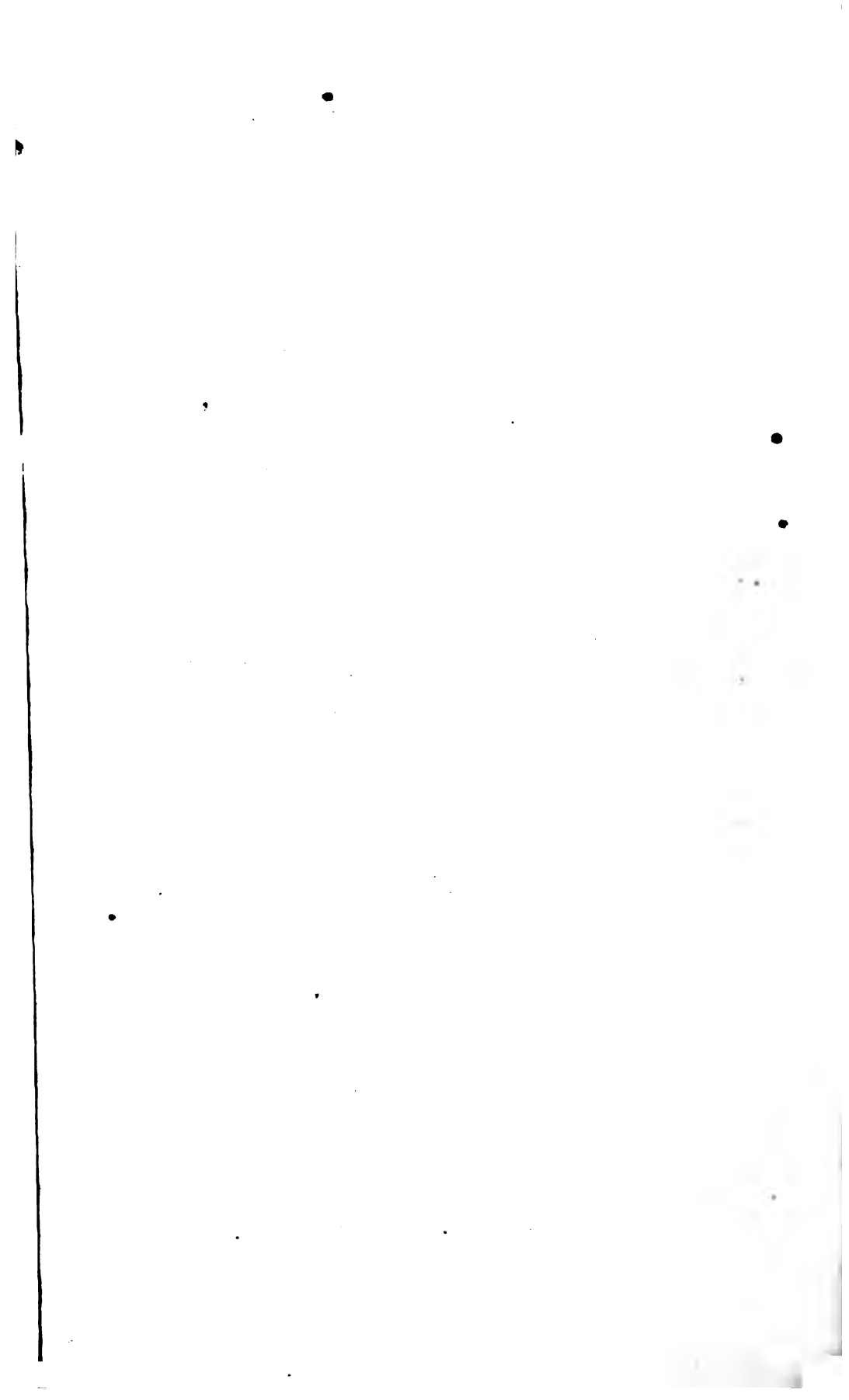
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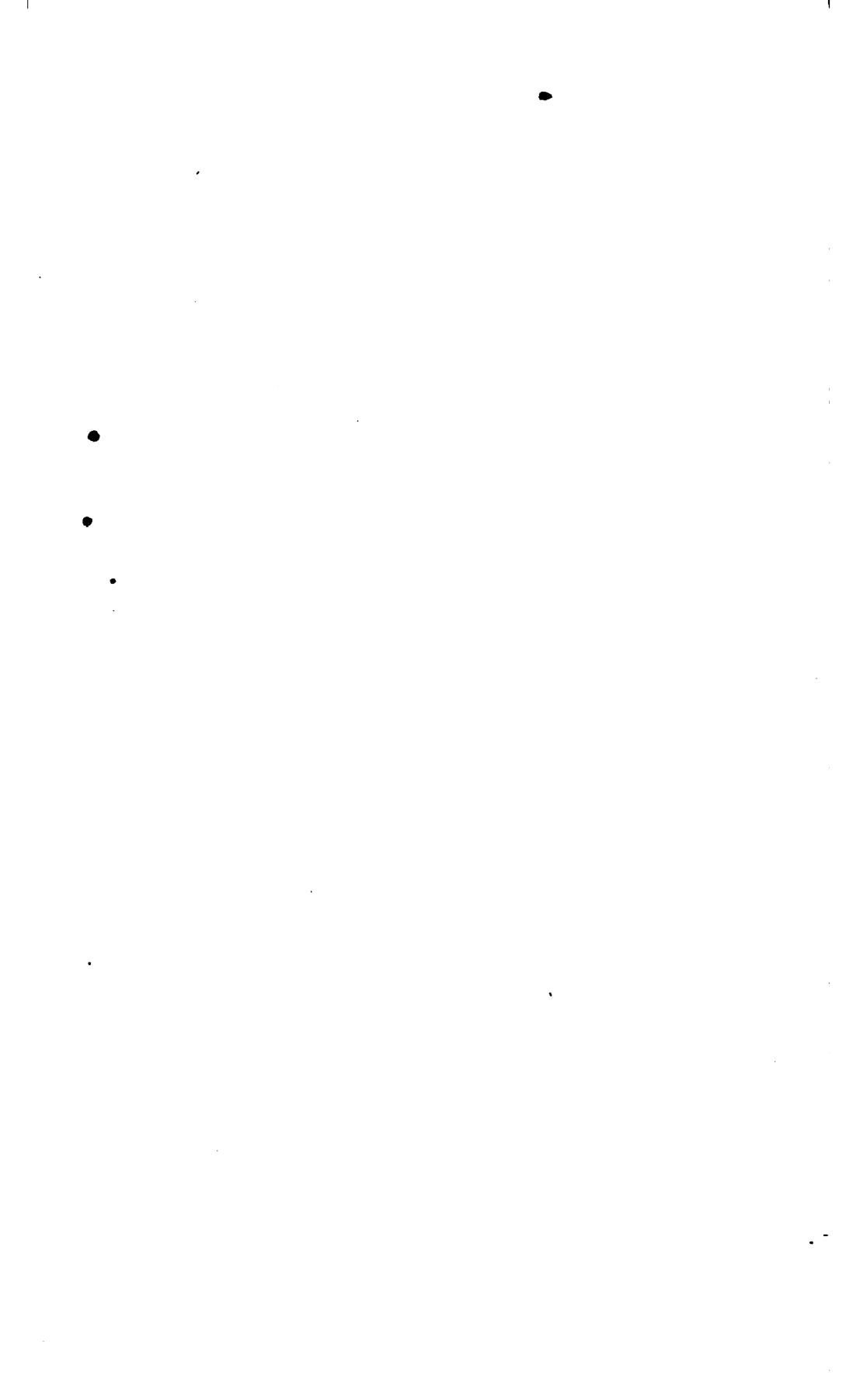


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A COLLECTION OF ACTS

RELATING TO THE

Jim 5

TRANSFER OF, OR DEALING WITH, LAND:

WITH THE

CASES DECIDED IN THE SUPREME COURT NOTED,

AND

A COPIOUS INDEX APPENDED.

COMPILED AND EDITED BY

ALEXANDER OLIVER, ESQ.,

BARRISTER-AT-LAW, ONE OF THE EXAMINERS OF TITLES UNDER THE REAL PROPERTY ACT.

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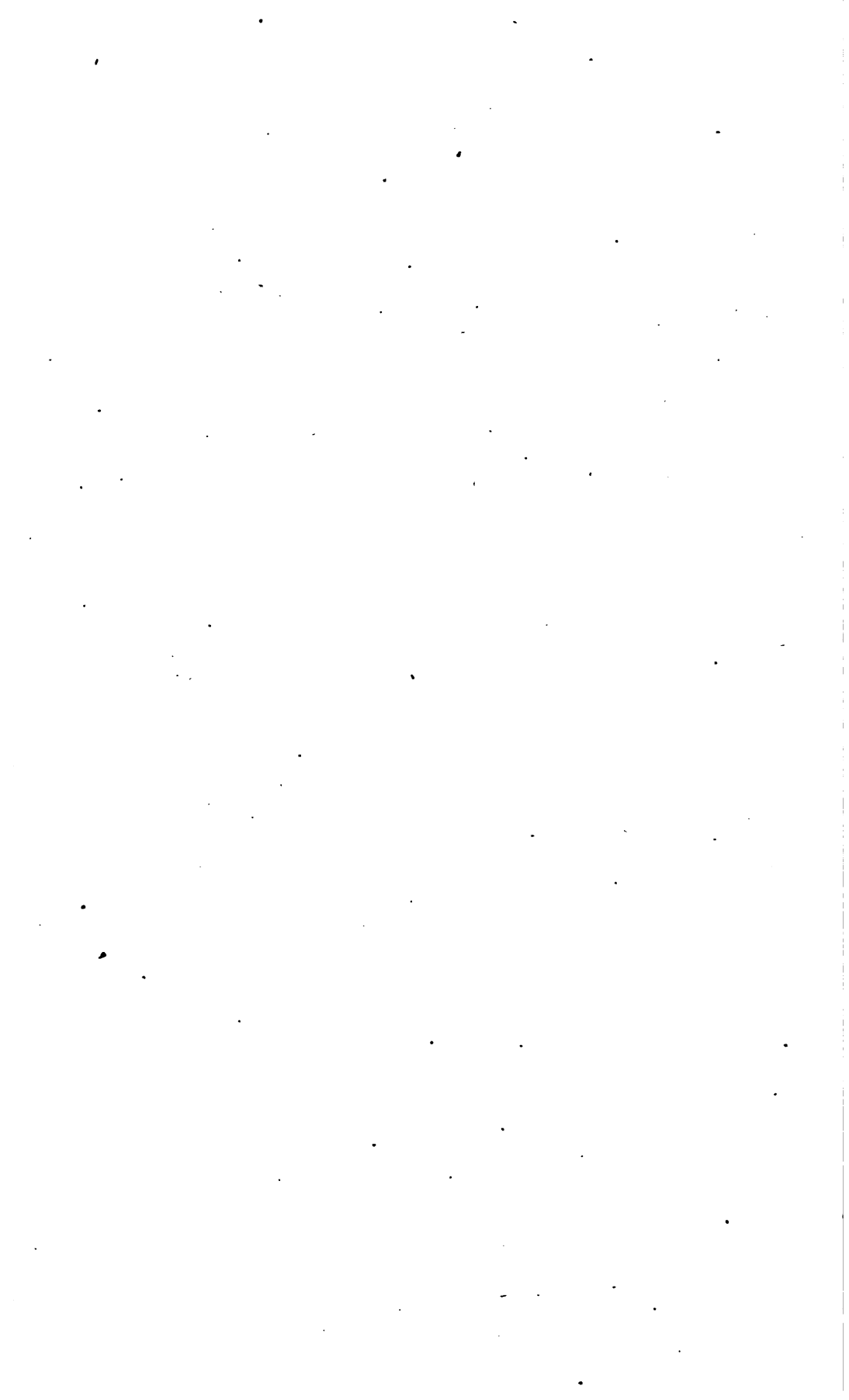
Rec. Oct. 17, 1904.

To

His Honor Sir James Martin, Knight,
Chief Justice of New South Wales,

This Collection of Real Estate Acts is respectfully dedicated by

The Author.



PREFACE.

IN order to prevent any misapprehension, it is proper to state, before indicating the scope and contents of this Collection of Acts, that the fact of its having been printed at the Government Printing Office implies no responsibility whatsoever on the part of the Government, either in respect of its contents or its omissions. All responsibility in connection with its compilation generally, and for any opinions expressed in the course of the following observations, attaches solely to the writer.

As the title imports, this is merely a collection of the many English and Colonial enactments which have a direct bearing on dealings with real estate; and to these are subjoined, in the form of foot-notes, such decisions of the Supreme Court as appeared to determine any question of construction, or to be otherwise valuable for purposes of reference. In other words, it is an attempt to bring together, in a compact and portable form, all those enactments to which the conveyancer of landed property requires to refer in practice, or whose bearing on proprietary rights and obligations ought to be known to its owners, as well as to all persons and associations concerned in dealing with it.

If the book has any value to the practitioner, it will probably be found in the alphabetical grouping of the various Acts heretofore scattered over thousands of pages, and several folio volumes, of the Statute Book, and perhaps also in the Index, upon which much labour has been bestowed, with the design of facilitating, both to the professional and the non-professional inquirer, the tedious and often difficult task of finding, amidst a mass of sections, the particular enactment sought for. And it may be mentioned here, that in order to assist persons to whom the forms in use under the Real Property Act may not be accessible, the whole of those forms, together with their very useful rubrics or commentaries, have been appended to the text of the Real Property Act.

The model followed in arrangement of subjects, annotation, type, and general form, has been Chitty's well-known Collection of the Statutes of Practical Utility. An Appendix has been added,

containing amongst other matters the whole text of the Charter of Justice and those sections of the Crown Lands Alienation Act of 1861, and of the Amending Act of 1875, which appeared to fall within the scope of the book, together with all the reported cases decided on those Acts.

In collecting the English Acts anterior to 1828, the writer has, he admits, undertaken a very formidable task; for the applicability of those Acts to the Colony has not, in many cases, been affirmed either by the Legislature or by the Supreme Court. Guided however by such opinions as the Judges have expressed from time to time, and by the feeble light of his own judgment, he has endeavoured, to the best of his ability, to bring together in these pages all those early Statutes which purport to concern real estate, and of whose applicability to the Colony there appeared no reasonable doubt, without however going farther back into the antiquity of Conveyancing than the era of the Tudors.

The notes of cases do not, as a rule, go back farther than the commencement of the present series of Supreme Court Reports. The Privy Council cases have however been carefully examined, and some valuable decisions have been extracted. If the book ever reaches a second edition, the writer hopes to be able to add a considerable number of decisions of our own Court collected from the early reports, but the time at his disposal has not enabled him for this edition to undertake a work demanding so much research.

The principle upon which the selection of Acts has been determined may not have been always rigidly adhered to; and some enactments have doubtless been incorporated which to many will appear redundant or inconsistent with the title of the book, and others have been omitted which might appear to fall properly within its scope. For example, all the provisions relating to "Ejectment" contained in the Common Law Procedure Act, and a considerable batch of enactments contained in the Acts dealing with persons under disability, have been deliberately omitted from this collection, because it was no part of the compiler's design to include Statutes of Procedure or to encumber the book with matter interesting only to litigants or petitioners before the Court. The rule, however, here indicated has not been in every case inflexibly observed, for to have done so would not have been always expedient. Thus, the entire text of the Trustees' and Trust Property Acts, and of some other Acts has been given, although much of those

Statutes specially concerns procedure. If, however, the collection shall be found open to criticism because of some omissions, it may not unreasonably claim to set off against that blemish the added matter comprised in the Appendix—the Charter of Justice, and the very little known Colonial Laws Validation Act (28 & 29 Vic., cap. 63), being not the least valuable additions.

Foremost among the Statutes relating to Real Property printed in this volume ranks the Real Property Act itself, which in a few months will have been in operation for a period of fifteen years. That Act and the system which it inaugurated, have in this Colony (as in the three adjoining Colonies), elicited a considerable amount of adverse criticism, not only from the legal profession but also from the general public, and there can be no doubt that much of that criticism is well founded. Still, when we consider the singular revolution in the law and practice of conveyancing which it introduced, as well as the large measure of hostility with which it was destined to cope, our Land Transfer Act will, it is conceived, be pronounced by impartial judges an achieved success; while those who are thoroughly familiar with it, whether officially in its administration or non-officially through much contact with the department by which it is worked, will nevertheless be able to point out many imperfections in design and machinery which, though serious enough in themselves, are not so formidable as to be out of the reach of amendment.

The enormous extent and value of properties already placed on the new register, amounting at the end of the year 1875 to 3,139,525 acres, valued at £6,447,484 18s. 11d., would alone be a sufficient reason for giving more prominence to the Real Property Act in this brief review than to any other conveyancing Statute; but there is another reason in justification of such prominence. All devolutions of estates and interests by operation of law, and all dealings, in respect of property so registered, are regulated and controlled, *in perpetuity*, by the provisions of the Real Property Act. This feature in the Torrens' system of registration, especially when it is remembered that all Crown grants issued since the 1st January. 1863, fall within the dominion of the Act, connects nearly all the landed proprietors, capitalists, and practising conveyancers in the Colony so intimately with that system—its development, its internal and external working, its merits and its demerits—that a fair measure of criticism should be invited rather than deprecated, even by its most pronounced admirers.

And if, haply, the present writer should be thought censurable for his assumption, while officially connected with the administration of this important Act, of the part of critic rather than of eulogist, it must not be forgotten that the founder and *Vates Sacer* of the system, Sir Robert Torrens, has succeeded in creating such a wide-spread and intense enthusiasm for his scheme of registration that its progress has been latterly somewhat retarded by mere excess of championship.

It may not, therefore, be out of place for a friendly critic to note some points which either indicate defects in this beneficial measure or afford matter for the further consideration of the Legislature:—

1. The existing system of issuing one class of certificates of title is not free from objection, as it ignores the distinction which must always exist between fiduciary and beneficial ownership. There should be some mode of ear-marking the certificates issued to trustees more effective than that now adopted, so that intending purchasers should not be encouraged to assist in the perpetration of frauds. The nature of a trustee's ownership is now only disclosed when a caveat protects a deposited Declaration of Trust, and that is a safeguard which in the case of settlements of property under the Act depends on the sagacity of the settlor or beneficiary. It ought rather to be a matter of official obligation.

2. The conditions and the nature of the ownership which give a status to apply for registration under the existing law are too circumscribed. Persons should be equally entitled to registration in virtue of a power to dispose of the fee-simple as in virtue of an estate.

3. The modern doctrine of the "separate use"—that most beneficial of all the creations of an enlightened Equity jurisprudence—has received only the very faintest recognition in the Act. This may perhaps be accounted for in some measure by the circumstance that the decisions which have finally established the doctrine on its present broad basis are not yet quite twenty years old.

4. The precise degree in which a Certificate of Title is declared to vest in the registered proprietor an estate, in reference to the land therein included, paramount to all others, or, in other words, the extent of indefeasibility which the Certificate of Title commands, is left by the Act in some little obscurity.

5. So also is the remedy for deprivation of an estate or interest in land, and for other loss or injury sustained by reason

of the registration of some other person as proprietor. It is the popular belief that any person damnified by the issue of a certificate of title to another has his remedy in an action for damages, for the payment of which the Assurance Fund in the first instance, and the Consolidated Revenue in the last resort, are made liable. The foundation of this belief has fortunately never yet been tested in the Supreme Court, but no one can read that part of the Act which deals with this matter, especially sections 115 to 122 inclusive, without a feeling of regret that so important a possibility in a Registration Act as the registration of the wrong man should be dealt with by provisions so involved in structure and so pregnant with difficulties of construction.

6. The attempt to substitute a system of transfers, accompanied by instruments declaring trusts, and protected by caveats, in lieu of the ordinary form of Settlements embodying the trusts in the same instrument, may be the logical outcome of the Torrens system of registration; but the provisions effecting the change are very inartificially designed, and stand in great need of elaboration.

7. The effect of cancellation after registration upon the various classes of covenants should have been settled by express enactment.

8. There should have been some provision in the Act compelling caveators to proceed to trial (after issue of writ and lodgment of notice of proceedings) within some reasonable time. At present an application is suspended indefinitely, so far as the department is concerned, upon notice of proceedings after caveat.

9. There is no machinery provided in the Act for the purpose of bringing an applicant and a caveator to an issue when the title to land is in dispute. The Act invites a rival claimant to lodge his caveat and then dismisses him to make the best of his case before another tribunal—the Supreme Court. This change of forum seems justifiable perhaps on the ground that it would have been dangerous to invest the Commissioners of Titles with judicial powers commensurate with the important function of deciding disputed titles to land. But if the Commissioners were selected from professional men familiar with the law of Real Property, and trained to sift and weigh evidence, there seems no well-founded objection to their investiture with the powers of a Court of First Instance. The creation of a Court of Titles, somewhat on the model of the Irish Encumbered Estates Courts, in the persons of the Examiners, had always been an article of faith for the late Mr. G. K. Holden,

and was a conspicuous feature in the Bill to remodel the Land Transfer system which he had prepared so far back as 1863, and had pressed—though unsuccessfully—upon successive Governments, from time to time, almost up to the year of his death.

10. The same Bill made provision, moreover, for the abolition of the office of Commissioners, and for a severance of the Land Titles Office from its then and still existing departmental connection with the Registrar General's Office. The first proposal was founded on the conviction that the interposition of an irresponsible lay Board between the investigation of titles by the officers virtually responsible for that duty and the actual issue of certificates was an increase of friction without any corresponding increase of power—was useless, either as a safeguard to the revenue or a check upon the Examiners—and was, moreover, open to the fatal objection common to all bodies so interpolated into a system as to fritter away the wholesome feeling of direct responsibility by diverting attention from the real to the ostensible agents. For years no such Board had existed in Victoria where the land transfer system had reached its highest development; and, indeed, no such Board would have been invented even in South Australia, where that system was first introduced, but for a most unwarrantable suspicion of the loyal administration of the Act, during its noviciate, by its official solicitors. (*) The present writer sees no reason for dissenting from the views of those able and dispassionate judges—his late predecessors—either in respect of the office of Commissioners, or in respect of the association of the Office of Titles with a statistical department with which it has no functional connection or affinity.

11. Some imperfections in structure, and some provisions of very questionable character, contained in our Real Property Act, are probably owing to an insufficient consideration of the corresponding enactments of the South Australian model, from which ours was but a transcript—although, it must be admitted, a transcript made after very mature deliberation and full consideration of rival schemes for the registration of titles. The present Land Transfer

(*) It will be within the recollection of many persons, that Sir Robert (then Mr.) Torrens was an important witness before the Select Committee on the Land Titles Declaration Bill, in 1862. That gentleman, at page 38 of the Evidence printed with the Report, says—"The only function of the Commissioners is to decide to what extent the claim of the party (*sc.* to be registered) shall be advertised, and the number of newspapers in which the advertisement shall appear, or whether it shall be advertised in any other of the Colonies or in Great Britain, and to advise and assist the Registrar General in this important duty."

Statute of Victoria is in every respect a much more studied measure than ours, and, though founded like our Act and that of Queensland on the South Australian, bears evident signs in its numerous and substantial variations from the original, that its framers knew when to avoid the beaten track as well as when to follow it.

12. The Statute has made no provision on the following subjects :—

- (a) Does the Statute of Limitations relating to Real Estate operate on land under the Act or not ?
- (b) How far are notifications on certificates to be deemed to be “notice” to purchasers and intending dealers in the equitable sense of the term ?
- (c) How far (if at all) do estates, interests, &c., registered under the old system, or unregistered, bind lands under the Act where there is no question of priority ?
- (d) What is a “lien” within the meaning of the Real Property Act ?
- (e) Is land under the Act subject nevertheless to the quit rents reserved on the original grant, and to all other conditions, reservations, and exceptions contained in such grant ?
- (f) Does the prohibition of the entry of trusts in the Register book, contained in section 66, bind the Crown ?

13. The procedure prescribed by the 107th section for an applicant proprietor feeling himself aggrieved by any act or omission by the Land Titles officers, through their statutory medium, the Registrar General, lacks precisely the two recommendations which this popular statute might have been expected to offer, viz., cheapness and dispatch.

The Supreme Court (or a Judge thereof) ought to have been made accessible to a complainant at any stage of his application, by means of the proceeding now so common in England—a case stated at the instance of the applicant—which, as a rule, would probably not be half so costly, nor half so dilatory a course, as the present cumbrous procedure by summons to show cause.

14. Fair holding titles ought to have received some sort of recognition. The general tenor of the Real Property Act in its present form appears to be opposed to the registration of titles of lower quality than what are known as “marketable” titles, and

the practice of the Examiners has, speaking generally,^(b) been in accordance with that view; but it is, at all events, worth considering whether fair holding titles might not be safely accepted on condition that the applicant shall either pay an increased premium (say not to exceed $2\frac{1}{2}$ per cent.) for their insurance, or (at his option) consent to the issue of a qualified certificate

(b) The Legislature having omitted to declare or even to indicate in the Real Property Act what kind of titles should be placed upon the Register, with the measure of indefeasibility accorded by the Statute, the duty of determining this important question practically devolved upon the Examiners of Titles. And they appear to have come to the conclusion, very soon after the introduction of the system, that the only titles which they would be justified in recommending the Government to guarantee were the class known as "marketable" titles, but with these qualifications,—that if the equitable portion of the title in any case were unexceptionable, outstanding legal estates and interests should not be allowed to interfere with its acceptance; and that, as the machinery of the Act provides means for disseminating notice of applications and for the lodgment of caveats, some effect must be taken to be extended to the equitable doctrine of acquiescence, as also some allowances made for exceptional cases of missing documents of title. A "marketable" title, it is needless to say, is such as a Court of Equity will compel an unwilling purchaser to accept. And as this is, speaking generally, the class of title which by the contract of sale itself, Equity will imply in the absence of special agreement as between vendor and purchaser, it would seem that it is this class and this class alone which the Government, who may as guarantors be considered as purchasers in effect, appear to be entitled to require. The Land Titles Commissioners too, it must be remembered, are invested by the Act with discretionary powers as to the acceptance or rejection of a title, which must not be disregarded in the consideration of this question; and the element of risk in any case may, it would appear from the Act, be left to their determination; but risk is itself so often a question inseparable from legal considerations, that it would obviously be inexpedient that applications having that ingredient should be remitted to the arbitrament of non-professional persons. In the neighbouring Colony of Victoria, where a system of land transfer and registration of title, in the main similar to our own, has long been established, the Commissioner of Titles is content with what are there described as "substantially good" titles; but it is not therefore to be inferred that he would commit the Victorian Government to mere "holding titles"; and even if it be the practice of the department in Victoria to issue certificates of title to applicants who may be unable to disclose a good, much less a marketable title, yet there is some justification in the Victorian Statute for such a practice which is entirely absent from our Act. That justification is implied by the power given to the Commissioner of Titles to demand an additional indemnity for imperfect titles; or, in other words, to compel the applicant to contribute to the assurance fund—(in that Colony the same as with us)—"such an additional sum of money as the Commissioner shall "certify under his hand to be in his judgment a sufficient indemnity, by reason of the non-production of any document affecting the title, or of the imperfect nature of the evidence of "title, or against any uncertain or doubtful claim or demand arising upon the title." The Government of this Colony guarantees titles on the payment once for all of $\frac{1}{4}$ d. in the £, or $\frac{1}{160}$ th part of the declared value of the land applied for. Thus, the title to a property the value of which is declared to be £20,000, is, if the title be accepted, insured for the consideration of 20,000 half-pence, or £41 13s. 4d. That consideration is obviously ridiculously incommensurate if the Government be supposed to accept "risky" titles. Risky titles, like risky policies of marine or life assurance, can only be justified on the ground of adequate premiums being in every case charged. But who is to measure the probability in £ s. d. of this or that *cestui que trust* setting aside a particular sale—of an ignored remainderman enforcing his claim for deprivation of estate against the assurance fund—of an executor selling the estate under an implied charge of debts—or of a presumed claim as heir-at-law being successfully impeached—and in every case to the prejudice and perhaps in some to the utter annihilation of the accepted title? Moreover, the acceptance of risky policies at all is excused rather than justified by the pressure of competition.

of title, the qualification to be so stated in the body of the certificate as to except from its indefeasibility any estates, interests, or rights which may be claimed by any person under a certain named instrument, or instruments, or anterior to a specified date. (e)

We now pass from the special consideration of the Real Property Act to the general body of Property and Conveyancing Acts comprised in this volume. Apart from the Statute of Charles the Second,^(d) which converted all the ancient tenures (with a few exceptions) into free and common socage, land in this Colony could not, in the nature of things, be holden by any other than the same free tenure. And our system of conveying freehold and other interests in land, and of dealing with it generally, has naturally enough followed, up to a certain point, in the well-beaten track of English conveyancing, so far as that system was capable of application in the Colony. Accordingly, our conveyancers have for nearly a century adopted the old Common Law Assurances as well as those which operated under the Statute of Uses. Of the former class the Feoffment was once a favourite form of conveyance, and indeed it is even now occasionally adopted; of the latter class the Bargain and Sale, and Lease and Release, were for long the accepted modes of transfer. The extraordinary assurance by Fine and Recovery, was, however, never introduced, probably because the proceedings connected with the levying of a Fine and the suffering of a Recovery were both costly and complicated, and because the curious judicial fictions on which those proceedings in the English Court were based could not be well imitated in our Court, and also perhaps because estates tail were never so common in this Colony as to require any very special provision to be made for barring them. As Fines and Recoveries were never known to our Law, so

The State, however, has no competitors in its monopoly of Insurer of Titles. From these considerations alone (which in no sense pretend to exhaust the subject) it would appear that the practice of the department in this Colony of refusing all titles but such as are unexceptionable from an equitable point of view, is justified by sound principle, as it most certainly has been justified by the test of experience, for the result of the latter criterion discloses the extraordinary fact that not a single claim has been successfully made (and only one made at all) against the assurance fund during a period of more than fourteen years.

(e) Several of the matters above indicated as deserving of consideration by the Legislature have, in fact, been dealt with in a Bill which was recently introduced in and passed through the Legislative Assembly by Mr. Terry. That Bill is now (September, 1877) before the Legislative Council, but without much probability of becoming law during the present year. The publication of this book was delayed for a considerable time with the view of including that Bill so soon as it should have been passed into law.

(d) 12 Car. II. cap. 24.

the English Act abolishing them^(e) has never been adopted, and the provisions for acknowledgment contained in the Registration Act^(f) remain our only substitute for the elaborate system established in England since 1834 by the Fines and Recoveries Abolition Act.

The most important Acts concerning estates in land adopted by us from the English Statutes passed in the reign of William the Fourth, are without doubt the Dower,^(g) Inheritance,^(h) Limitation of Real Property Suits,⁽ⁱ⁾ and Wills Acts.^(j) And so far it cannot be said, that since the time when Imperial Laws ceased to be operative in the Colony (25 July, 1828), we have been oblivious or careless of introducing into our Statute Book the most prominent English laws applicable to our condition. Adaptation, rather than a mere literal adoption of these laws, would perhaps have been the preferable course, but no doubt the lawgivers of that period thought that any deviation from the English models was dangerous. A different opinion prevails at the present day; but the experience which has created that opinion, it was, of course, not within the power of the last generation to forecast. From about the year 1840, the diligence exhibited by the Legislature in assimilating our Property Law to that of England appears to have abated. In 1852, the 13 & 14 Vic. cap. 60 (a valuable enactment concerning property vested in Trustees or Mortgagees) was adopted; but it may be said, with few exceptions, that since that year, very little English Property Law has been embodied in our Statute Book, the chief exceptions being Locke King's Act, 17 & 18 Vic. cap. 113, and the Acts known by the names of Lord Cranworth's and Lord St. Leonards' Acts (22 & 23 Vic. cap. 35, and 23 & 24 Vic. cap. 145)—the first-named Act having been adopted by our 19 Vic. No. 1, and the last two by our Trust Property Act, 26 Vic. No. 12. It may be said that during the last two decades we have been engaged in passing measures possessing at least the merit of originality; but this apology can hardly be maintained, at least in that branch of law which is now under consideration. The Real Estates of Intestates Distribution Act, which came into force in July, 1863, may certainly lay some claim to originality—(and it is indeed a well-meant, though insufficiently

(e) 3 & 4 Wm. IV. cap. 174.

(f) 7 Vic. No. 16.

(g) 3 & 4 Wm. IV. c. 105; adopted by 7 Wm. IV. No. 8.

(h) 3 & 4 Wm. IV. c. 106; adopted by 7 Wm. IV. No. 8.

(i) 3 & 4 Wm. IV. c. 27; adopted by 8 Wm. IV. No. 3.

(j) 7 Wm. IV. and 1 Vic. c. 26; adopted by 3 Vic. No. 5.

elaborated measure)—but the Act which introduced the new Registration system in this Colony (26 Vic. No. 9), and the short amending Act passed in 1873, were almost literal copies of South Australian Acts. Indeed, the work of the transcriber in the first or principal Act has been so artlessly done that those sections of the South Australian Statute (No. 22, of 1861) which were most distinguished by faultiness of structure, perplexity, ambiguity, and a tendency to work mischief, have been reproduced in our 26 Vic. No. 9 with curious fidelity. ⁽¹⁾

The present is not an occasion when it is desirable to institute a minute comparison of modern English legislation on subjects concerning Real Property with our own, but a very cursory comparison discloses some extraordinary contrasts and some results which cannot be said to be altogether creditable to us as an English community. For example, we are still without any modern statute regulating the granting of Probates of Wills and of Letters of Administration—the Ecclesiastical Jurisdiction of the Supreme Court remaining for these purposes exactly as it was more than half a century ago—we are still without any Statute corresponding with Lord Tenterden's Act, and therefore continue dependent on the Common Law in respect of titles to incorporeal hereditaments by prescription—tenants for life or in tail without express powers in

(1) In the compass of a note it is scarcely possible to specify all the sections of the Act which might be relied on to support the statement in the text. But mere enumeration without explanation would not avail much; and explanation would in almost all cases demand more space than could be conveniently accorded. Two, however, of the "mischievous" sections referred to may be here noticed—the 39th and the 49th. The first of these sections enacts that no unregistered instrument shall be effectual to pass any estate or interest in land under the provisions of the Act. So that if a registered proprietor, by a written contract, agrees to sell land, acknowledges to have received the purchase money, and—without more—dies, that contract passes *no* estate or interest in the land unless it shall have been registered under the Act, although there be no question of priority involved. Can anything be conceived more alien from equitable principles, and more mischievous than such an enactment as this? Equally mischievous as to leases of land under the Act for less than three years is the 49th section. Such leases cannot be registered under the Act. What then become of the rights of a lessee (for say two years) under section 39? Could he enforce them? In South Australia there has been a recent decision of the Supreme Court to the substantial effect that he could not, and a still more recent decision apparently determining that such a lease would not be invalid. The same Court also decided in another case, to the dismay of many friends of the Act, that the conscience of a registered proprietor was not bound by equities under an unregistered instrument to which he himself was a party! And the mischief is intensified by the fact that no mere contract can be registered under the Act: all that the party interested under the contract can do to protect his interest is to keep a caveat on the file until the dealing shall be actually registered—a pleasant prospect in many cases of transmission of title by operation of law. Let that formal registration, if you will, be a condition precedent to the right of the equitable owner, mortgagee, or lessee, to transfer or deal with the land—but provide for the right or equity *to be registered*, at all events, of the man whose equity to the ownership, and therefore to registration as owner, is, in the case supposed, unchallengeable.

the instruments creating their estates have still to apply to the Legislature for powers to grant long leases for agricultural, building, or mining purposes; whilst in England, for more than twenty years, under the powers contained in the Leases and Sales of Settled Estates Acts, such leases may, subject to certain prescribed conditions, be granted by owners of limited estates—there is absolutely no restriction whatever in this Colony on the barring of an estate tail, except the merely formal requirements of the Registration Act. In England the consent of the Protector of the Settlement has long been a condition precedent to the exercise of such a power. This valuable provision, as well as many others contained in the Act for the Abolition of Fines and Recoveries, are here unknown. Another extraordinary omission in our Real Property Code is that of the 8 & 9 Vic. cap. 106—the Real Property Amendment Act—in consequence of which many important questions as to leases, reversions, feoffments, contingent remainders, &c., are still undetermined. And one very important change in conveyancing, viz., the substitution of a simple Deed of Grant in place of the old familiar Lease and Release, would appear to have in this Colony, in consequence of this same omission, so far as the conveyance of an immediate freehold estate in land is concerned, the sanction only of usage in its support. So, in respect of the law of attendant terms, we are without the Satisfied Terms Act, 8 & 9 Vic. cap. 112; without any statute enabling tenants for life to improve the property of which they are in possession, such as the 8 & 9 Vic. cap. 56; without any Acts corresponding to the English Improvement of Land Act of 1864, the Limited Owners' Residences Acts, the Lands Clauses Consolidation Acts, the Rents Apportionment Act of 1870, the Partition Acts, the Married Womens' Property Act, the Vendors and Purchasers Act, and many other more or less recent English Statutes affecting the law of Real Property. No doubt the same complaint may be made in respect of other departments of our Statute Law, and notably in that of Equity Practice and Procedure and the Law relating to Insolvency and Debtors. At the same time it must be admitted that much mischief and confusion have been caused by the indiscriminate adoption of English Acts. There can hardly be two opinions as to the mischief which has been sown by the irrational attempt to acclimatize in this Colony the English Statute of Limitations affecting Real Estate. Another adopted Act teems with provisions relating to *copyhold lands*, and even the comparatively recent Wills Act contains sections relating

to *Customary and Copyhold Estates*, while the Statute of Limitations just referred to contains some very learned provisions in restriction of the right to recover an *advowson*, which it is needless to say are as inapplicable to this Colony as is the nineteenth section of the same Act, which by the same absurd system of wholesale adoption is made to announce that no part of the United Kingdom of Great Britain and Ireland, &c., &c., shall be deemed to be "beyond the seas"—an intrinsically ridiculous declaration when applied to countries separated by at least two oceans, but one nevertheless which it required, quite recently, a solemn decision of the Supreme Court to get rid of.

In the judgment of some who are well qualified to give an opinion, there will hardly be found an adequate remedy for this very unsatisfactory state of things—the absence of beneficial Imperial laws from our Statute Book, and the presence therein of exotic laws wholly unsuited to our circumstances—until the Legislature shall consent to the creation of a permanent College or Commission of Jurists, whose duty it shall be to present to Parliament, from time to time, well-designed and carefully-prepared groups of Consolidation Acts covering the entire domain over which our Statute Law ought to range. ⁽¹⁾

(1) The writer makes no apology for appending the following extract from the well-known *Treatise on Representative Government* by the late John Stuart Mill, because it is the statement by a master mind of the reasons for adopting some such expedient as that above suggested:—

"There is hardly any kind of intellectual work which so much needs to be done not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws. This is a sufficient reason, were there no other, why they can never be well made but by a committee of very few persons. A reason no less conclusive is, that every provision of a law requires to be framed with the most accurate and long-sighted perception of its effect on all the other provisions; and the law when made should be capable of fitting into a consistent whole with the previously existing laws. It is impossible that these conditions should be in any degree fulfilled when laws are voted clause by clause in a miscellaneous assembly. The incongruity of such a mode of legislating would strike all minds, were it not that our laws are already, as to form and construction, such a chaos, that the confusion and contradiction seem incapable of being made greater by any addition to the mass. Yet even now, the utter unfitness of our legislative machinery for its purpose is making itself practically felt every year more and more. The mere time necessarily occupied in getting through Bills, renders Parliament more and more incapable of passing any, except on detached and narrow points. If a Bill is prepared which even attempts to deal with the whole of any subject (and it is impossible to legislate properly on any part without having the whole present to the mind), it hangs over from session to session through sheer impossibility of finding time to dispose of it. It matters not though the Bill may have been deliberately drawn up by the authority deemed the best qualified, with all appliances and means to boot; or by a select commission, chosen for their conversancy with the subject, and having employed years in considering and digesting the particular measure: it cannot be passed, because the House of Commons will not forego the precious privilege of tinkering it with their clumsy hands. The custom has of late been to some extent introduced, when the principle of a Bill has been affirmed on the second reading, of referring it for considera-

In conclusion, the writer wishes to state—but without any desire to avert unfavourable criticism—that the work of collecting materials for this volume has of necessity been assigned to such rare intervals of leisure as his official duties left at disposal. He is apprehensive, therefore, that much of that work will be found to

tion in detail to a Select Committee; but it has not been found that this practice causes much less time to be lost afterwards in carrying it through the Committee of the whole House: the opinions or private crotchets which have been overruled by knowledge, always insist on giving themselves a second chance before the tribunal of ignorance. Indeed, the practice itself has been adopted principally by the House of Lords, the members of which are less busy and fond of meddling, and less jealous of the importance of their individual voices, than those of the elective House. And when a Bill of many clauses does succeed in getting itself discussed in detail, what can depict the state in which it comes out of Committee! Clauses omitted, which are essential to the working of the rest; incongruous ones inserted to conciliate some private interest, or some crotchety member who threatens to delay the Bill; articles foisted in on the motion of some sciolist with a mere smattering of the subject, leading to consequences which the member who introduced or those who supported the Bill did not at the moment foresee, and which need an amending Act in the next session to correct their mischiefs. It is one of the evils of the present mode of managing these things, that the explaining and defending of a Bill, and of its various provisions, is scarcely ever performed by the person from whose mind they emanated, who probably has not a seat in the House. Their defence rests upon some minister or member of Parliament who did not frame them, who is dependent on cramming for all his arguments but those which are perfectly obvious, who does not know the full strength of his case, nor the best reasons by which to support it, and is wholly incapable of meeting unforeseen objections. This evil, as far as Government Bills are concerned, admits of remedy, and has been remedied in some representative constitutions, by allowing the Government to be represented in either House by persons in its confidence, having a right to speak, though not to vote.

If that, as yet considerable, majority of the House of Commons who never desire to move an amendment or make a speech, would no longer leave the whole regulation of business to those who do; if they would bethink themselves that better qualifications for legislation exist, and may be found if sought for, than a fluent tongue, and the faculty of getting elected by a constituency; it would soon be recognised, that in legislation as well as administration, the only task to which a representative assembly can possibly be competent, is not that of doing the work, but of causing it to be done: of determining to whom or to what sort of people it shall be confided, and giving or withholding the national sanction to it when performed. Any government fit for a high state of civilization, would have as one of its fundamental elements a small body, not exceeding in number the members of a Cabinet, who should act as a Commission of Legislation, having or its appointed office to make the laws. If the laws of this country were, as surely they will soon be, revised and put into a connected form, the Commission of Codification by which this is effected should remain as a permanent institution, to watch over the work, protect it from deterioration, and make further improvements as often as required. No one would wish that this body should of itself have any power of *enacting* laws; the Commission would only embody the element of intelligence in their construction; Parliament would represent that of will. No measure would become a law until expressly sanctioned by Parliament; and Parliament, or either House, would have the power not only of rejecting but of sending back a Bill to the Commission for reconsideration and improvement. Either House might also exercise its initiative, by referring any subject to the Commission, with directions to prepare a law. The Commission, of course, would have no power of refusing its instrumentality to any legislation which the country desired. Instructions, concurred in by both Houses, to draw up a Bill which should effect a particular purpose, would be imperative on the Commissioners, unless they preferred to resign their office. Once framed, however, Parliament should have no power to alter the measure, but solely to pass or reject it; or, if partially disapproved of,

be faulty. If, however, those inquirers who may detect errors, whether of omission or commission, will inform him of such discoveries, he will feel under great obligations to them, and will atone for his shortcomings in the next edition of the book.

A. O.

September, 1877.

remit it to the Commission for reconsideration. The Commissioners should be appointed by the Crown, but should hold their offices for a time certain, say five years, unless removed on an address from the two Houses of Parliament grounded either on personal misconduct (as in the case of judges), or on a refusal to draw up a Bill in obedience to the demands of Parliament. At the expiration of the five years a member should cease to hold office unless reappointed, in order to provide a convenient mode of getting rid of those who had not been found equal to their duties and of infusing new and younger blood into the body.

"The necessity of some provision corresponding to this was felt even in the Athenian Democracy, where, in the time of its most complete ascendancy, the popular Ecclesia could pass Psephisms (mostly decrees on single matters of policy), but laws, so called, could only be made or altered by a different and less numerous body, renewed annually, called the Nomothetæ, whose duty it also was to revise the whole of the laws, and keep them consistent with one another. In the English Constitution there is great difficulty in introducing any arrangement which is new both in form and in substance, but comparatively little repugnance is felt to the attainment of new purposes by an adaptation of existing forms and traditions. It appears to me that the means might be devised of enriching the Constitution with this great improvement through the machinery of the House of Lords. A Commission for preparing Bills would in itself be no more an innovation on the Constitution than the Board for the administration of the Poor Laws, or the Inclosure Commission. If, in consideration of the great importance and dignity of the trust, it were made a rule that every person appointed a member of the Legislative Commission, unless removed from office on an address from Parliament, should be a Peer for life, it is probable that the same good sense and taste which leave the judicial functions of the Peerage practically to the exclusive care of the Law Lords, would leave the business of legislation, except on questions involving political principles and interests, to the professional legislators; that Bills originating in the Upper House would always be drawn up by them; that the Government would devolve on them the framing of all its Bills; and that private members of the House of Commons would gradually find it convenient, and likely to facilitate the passing of their measures through the two Houses, if instead of bringing in a Bill and submitting it directly to the House, they obtained leave to introduce it and have it referred to the Legislative Commission. For it would, of course, be open to the House to refer for the consideration of that body not a subject merely, but any specific proposal or a Draft of a Bill *in extenso*, when any member thought himself capable of preparing one such as ought to pass; and the House would doubtless refer every such draft to the Commission, if only as materials, and for the benefit of the suggestions it might contain: as they would, in like manner, refer every amendment or objection, which might be proposed in writing by any member of the House after a measure had left the Commissioners' hands. The alteration of Bills by a Committee of the whole House would cease, not by formal abolition, but by desuetude; the right not being abandoned, but laid up in the same armoury with the royal veto, the right of withholding the supplies, and other ancient instruments of political warfare, which no one desires to see used, but no one likes to part with, lest they should at any time be found to be still needed in an extraordinary emergency. By such arrangements as these, legislation would assume its proper place as a work of skilled labour and special study and experience; while the most important liberty of the nation, that of being governed only by laws assented to by its elected representatives, would be fully preserved, and made more valuable by being detached from the serious, but by no means unavoidable, drawbacks which now accompany it in the form of ignorant and ill-considered legislation."—Representative Government, pp. 97-103.

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APPENDIX.

CONTAINING

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(Taken from Callaghan's Acts).

COLONIAL LAWS VALIDATION (28 & 29 Vic. c. 63).

CROWN LANDS ALIENATION (25 Vic. No. 1).

LANDS ACTS AMENDMENT ACT. (39 Vic. No. 13,
Extracts from).

MARRIAGES, COLONIAL. (28 & 29 Vic. c. 64).

REGISTRATION OF DEEDS ACTS. (Extracts from
repealed Acts, 6 Geo. IV. No. 22, and 5 Vic.
No. 21).

CORRIGENDA ET ADDENDA.

- Page 5. Note (3), *dele* "a" before "real estate."
- „ 27. Side-note to sec. 79 should read "Registrar to execute bargain and sale."
- „ 48. In note (18) for "with" about £4,000 read "worth" about £4,000.
- „ 70. In first line of note to Mortgages, instead of "sub" title, &c., read "under" title, &c.
- „ 80. In line 32 of note, read "have" instead of "having."
- „ 87. Side-note to sec. 6 should read "Provisions of Act to apply to Executors in case of partial intestacy, and to Curator of Intestate Estates."
- „ 101. In side-note to sec. 70, for "Province" read "Colony."
- „ 111. Sec. 116, line 2, for "except" read "excepted."
- „ 145. Sec. 21, line 4, for "or" read "on."
- „ 154. Sec. 26, line 2, insert comma after "survived" and *dele* comma after "deaths."
- „ 168. Side-note to sec. 25, for "mortgagor's" rights of action read "mortgagee's" rights of action.
- „ 189. Sec. 29, line 9, *dele* comma after "issue."
- „ 202. Line 12 of foot-note, *dele* "following" and insert "accordingly."
- „ „ Line 13, after "174," that part of the note commencing from "Plaintiff" should have formed a new paragraph.
- „ 210. Line 8, *dele* the words within [—] and insert "See Annie Joachim's case, p. 202, *supra*."
- „ 224. *Dele* the last foot-note.

Some of the following cases were accidentally omitted to be arranged under their respective sections in the body of the work, and others have been decided while it was passing through the press :—

Inheritance.—Sec. 2, p. 46, add *Badham v. Shiel*, reported 7 Jur. N.S., pt. 2, p. 509.—In that case the Court (Wise, J., *dissentiente*) decided an important point on the Inheritance Act, 3 & 4 Wm. IV. c. 106, adopted in N.S.W. by 7 Wm. IV. No. 8. The plaintiff brought an action on a covenant against the grandson of one Mary Cannon, deceased, the covenantor, as her heir-at-law—Mary Cannon having, it was admitted, herself inherited the lands in question from her father, Thomas Bradbury, who was the first purchaser. The defendant pleaded that he had not any lands by descent from the said Mary Cannon. The plea was held bad. [This decision has at least the merit of avoiding an injustice; and although at first sight hardly reconcilable with the declaration in the Inheritance Act that "in every case descent shall be traced from the purchaser," yet draws a substantial distinction between the tracing of descent from the purchaser for the purpose of determining a right of inheritance, and the tracing of descent from the same person, but through an intermediate heir, for the purpose of fixing a liability on the heir of such intermediate heir in respect of a bond. In other words, A who inherits lands from his grandmother B, who herself inherited from her father C, the first purchaser, shall not escape liability on B's bond, by a plea of *riens per descent*, to be set up by tracing descent from C, and ignoring descent through B, the obligor.—Ed.]

Real Property Suits Limitations.—Add as note to sec. 2, p. 75.—The evidence of possession was that of a person who was on the land (which it appears was unenclosed forest land) twenty-four years previously, and who allowed his cattle to graze over it. He could not give any boundaries of the land except a creek on one side of it. *Per Curiam* (Martin, C.J., Hargrave and Faucett, J.J.), on motion for new trial :—"Any possession upon which an action of trespass may be maintained is sufficient to give a title under the Statute of Limitations. But the possession must be coextensive with the property claimed, and here there is no evidence of the extent of the occupation. The grazing must be a grazing with the owner's intention, and not a mere trespassing by the cattle. There must be evidence of the user of the land with the intention of using and occupying it. Here there was no evidence of the number of the cattle and no description of the land taken up."—*Illidge and another v. Leary and another*. 1, Knox, S.C. Cases, 139.

Real Property Act.—Add as note to section 40 : *Sempill v. Jarvis*, 6, S. C. R., Eq. 68; and on appeal, *ibid*, p. 74. In this case the important question, whether by mere registration under the Real Property Act a registered proprietor can avail himself of the provisions of the 40th section of that Act so as to get rid of equities attaching to him in relation to the land so registered, was determined in the negative. The facts of the case are fully set out in the note to the report, and in the judgment of the Primary Judge which is given *in extenso*: *Per Hargrave, J.*—"It was contended at the argument, that the defendant's proceedings under the

Real Property Act are sufficient to protect the defendant's purchase, he having obtained from the Crown (through the alleged agreement with Sheppard) a grant to himself of the fee simple and legal estate in this land, this grant being dated 27th June, 1866, and being duly registered and also duly recorded and enrolled on the 3rd July, 1866, both grant and registration therefore being long subsequent to the above sale and also to the insolvency. The defendant in fact contends that by force of the word '*indefeasible*' in the 40th section of the Real Property Act, and the words '*rules of law and equity*' in the 115th section of that Act, every duly '*registered proprietor*' of land under that Act is enabled by such registration alone to get rid of and set aside all equities whatever residing in himself in relation to such estate, although even (as in this case) a statutory equity in favour of an insolvent's creditors, and although admitted by the answer, or satisfactorily established by evidence, as binding on the conscience of the defendant up to the present time. Now it seems to me that such a construction of the Real Property Act cannot be supported, either by any argument or any principle. For, first, no one can argue that the Real Property Act was intended, *per se*, to alter and abolish by implication the whole law of trusts; also, to confound the distinction between legal and equitable estates, as well as to abolish all the equitable doctrines relating to trusts and to notice, and, consequently, to set aside all the rights and interests of all *cestui que trusts*, claiming either by admissions or proofs against trustees to have their various existing and equitable interests maintained and enforced by decree of equity whenever necessary. Neither this, our colonial statute, nor the analogous statutes in England, Ireland, and other colonies, could possibly have been intended, *per se*, to defeat all *cestui que trusts*, and to deprive all other parties of all their lawful rights in Courts of Equity. For example, why should not the trustees of a settlement, or of a will, obtain all the real advantages provided by this Act as to the legal estate—by registering their title to such legal estate, and rendering such title to the legal estate indefeasible as provided by the Act; but why should the trustees thereby destroy all the equities vested or admitted to be vested in themselves on behalf of their *cestui que trusts*. In the second place, I cannot admit for an instant that these Real Property Statutes were intended to enable the trustees of legal estates, with full knowledge and notice of such trusts, by mere registration of their title to the legal estate, and obtaining a certificate of such title, to get rid of all their trusts, whether open or secret, and whether for good consideration, for voluntary consideration, or otherwise, then legally existing as against the trustees themselves and their legal estates; and which except for this registration of title would be admitted or proved to be enforceable against the trustees by suit in Equity. Thirdly, the section 80 of this statute as to permitting notices of trusts to be entered in the registry, and many other sections of the statute, may be cited as being wholly at variance with any such interpretation as contended for by the defendant. Fourthly, it seems to me that if a Court of Equity should give to the statute any such interpretation of this enactment, its most useful, beneficial, and valuable provisions would become the means of the grossest frauds, and would cause a needless and complete repeal of all equitable jurisdiction in the enforcement of all trusts whatever; a construction the more absurd, because the Equity jurisdiction was invoked, as in this case, not in any degree to set aside the indefeasible title or certificate of the trustee, but only to render such title or certificate available for all lawful equities affecting such title or certificate. Fifthly, I am also of opinion that the 118th section, as to protection of the *bonâ fide* purchasers and mortgagees when obtaining their title from the owner of the certificate without fraud, is very strongly confirmatory of this construction of the previous sections of the statute as being the only construction consistent with the rights of property, with the rules of justice and equity, or with any reasonable interpretation of the intention of the Legislature. I am quite clear, therefore, that the Real Property Act affords to this defendant no protection against the decree prayed by the defendant's bill, which decree I, therefore, now make; and the defendant, having set up an inequitable defence to the bill, must pay the defendant's costs up to and including the hearing of the cause; but the decree will be so drawn as to protect the defendant's rights as mortgagee, and also to give him a lien for the payment of the purchase money." An appeal to the full Court from this decree was dismissed with costs.

Ss. 55, 56, and 57.—Notice of default precedent to sale of mortgaged land. See *Ex parte Hassall and another*, 10, S. C. R., 292, in which case it was decided by a majority of the Court (Stephen, C. J., *dissentiente*) that the Registrar General is entitled to the production of proof, not only of default of payment of the principal sum, interest, &c., secured by the mortgage, for the space of one calendar month as prescribed by the 55th section, and of the continuance of such default for a like period as required by the 56th section that is to say, of two months' default after the due day of payment—but also of proof under section 57 that such default continued up to the day of sale of the mortgaged property.

In *Campbell v. The Commercial Bank*, 2, Knox, S. C. C., 240, it was held that a demand of more than was actually due, made by the mortgagee under section 55 of the Real Property Act, does not vitiate the notice to pay given under that section.

Add, also, as note to sec. 92, p. 105: The following case, on appeal from the Supreme Court of Victoria, reported 2, L. R., P. C. A., 110, may be referred to with advantage in the construction of section 92 of the Real Property Act:—"On the 2nd of January, 1872, B's transferrer presented for registration under the *Transfer of Lands Statute*, transfers of certain lands; and on the 21st of the same month B obtained registration of the transfers and the usual certificates of title. More than three months previously, viz., on the 20th of October, 1871, a copy of a writ of *feri facias* (which had been issued by the Supreme Court in an action against the said

transferrer) was served on the appellant under section 106 of the said statute, specifying the said lands as 'the lands sought to be affected thereby,' and was by the appellant duly entered. On the 5th of January, 1872, a copy of an *alias fieri facias* in the same action, with a statement specifying the same lands as the lands sought to be affected by such writ, was also served on the appellant. On the 2nd and 28th of March, 1872, transfers of the same lands from the District Sheriff to the respondent under the *alias* writ were lodged for registration with the appellant, who refused to register them or to issue certificates of title. *Held*, on petition by the respondent under section 135 of the said statute, that the appellant was right in such refusal. B had, previously to the 5th of January, 1872, acquired a title to the lands which could only be defeated by a Sheriff's transfer of them in pursuance of the original writ; and as the respondents' transfers were in pursuance of the *alias* writ, and were made at a time when, according to the statute, no valid transfer could have been made in execution of the original writ, the appellant was right in completing B's title by registration on the 21st of January. *Per Curiam*.—"The policy of the Legislature in framing this section was obviously to prevent titles from being affected by the operation beyond a limited time of unexecuted writs of execution as charges on the land, and to reconcile the rights of a judgment creditor with those of a purchaser for value whether with or without notice. Both objects are effected by compelling the creditor to proceed within a limited time to enforce an execution by actual sale of the land affected thereby."—*Registrar of Titles v. Paterson*."

S. 107.—With reference to *Ex parte Pennington and others*, 13, S. C. R., 305, cited at page 109, *post*, it will be useful now to consider the more recent decision, on the application of the same parties, but as to a different parcel of land, reported in *S. M. Herald* of September 5, 1877. The judgment of the Court in the latter case would appear to be, that the effect of the Underwood Estate Acts was to vest in the statutory trustees the estates of James Underwood, freed from the trusts of his will as well as from any incumbrances created by the beneficiaries thereunder, but not freed from any incumbrances created by the testator or the trustees; that none but the latter class of incumbrances, therefore, should be investigated by the Examiners for the purpose of being noted on the certificate of title as directed by the Court in the former case. This decision seems also to determine the following points under the Real Property Act:—

1. Under the 22nd section of that Act a judgment of *non pros.* signed by applicant has the same effect in disposing of a caveat, as a "decision" of the Court.
2. But where a caveator had, under the 23rd section, taken proceedings by issuing a writ, which writ had been from time to time renewed, although, as it appeared, it had never been served on the applicants, and although no *proceipe* had been filed at the dates of such renewal, the Court held by majority (following *Ex parte Macintosh*, 10, S. C. R., 146, *post*, p. 104) that the caveat in that case had not been abandoned by a delay of more than fifteen months in prosecuting proceedings, and must be removed by an application under the 82nd section of the Act, and not be dealt with in an application under the 107th section. (The caveator was represented by counsel.)

Real Estate of Intestates Distribution.—Add as note to sec. 2, page 86: "See *The Queen v. Dickson*, 8, S. C. R., pp. 13, 14, *ubi per Curiam*.—"We think that the natural and indeed the unavoidable conclusion to be deduced from these words is, that the Legislature which had by the first section transferred the succession to the real property of an intestate from his heir-at-law to his personal representatives, intended by this second section to give the property so transferred all the *qualities of personal assets*—to impress it by *law* with the character of personality for all purposes, from the moment of the intestate's death—and to make it undistinguishable in the hands of the personal representatives from other personal assets. Such property is thus, in fact, converted by the statute, while in the hands of the personal representatives, into personal estate'."

Crown Lands Alienation Act of 1861, ss. 13, 18, and 19.—The plaintiffs lodged an application for a Mineral Conditional Purchase under s. 19 of the "Crown Lands Alienation Act of 1861," of lands described as follows: "County of Bathurst, parish of Bracebridge, 40 acres, about 1 mile east of road from Spring Vale to James Park, and about a mile in a southerly direction from Markham & West's copper lease—to be taken as marked by applicants." Certain land not in the parish mentioned, and to the north of Markham & West's copper lease, was marked by the applicants, and was being worked by them at the time of the application. *Held* (per Sir James Martin, C.J., and Sir W. Manning, J.—Hargrave, J., *dissentiente*), that without the words "to be taken as marked," the description was void for uncertainty; but that with those words it was capable of being rendered certain, and that the Judge was justified in leaving the question of identification to the jury: *Per Hargrave, J.*—The description, without the words referring to the marking, was a sufficient compliance with the requirements of s. 13. *Held* also, that the words "to be taken as marked" controlled the inconsistent words of the description. After the plaintiffs' application a mineral lease of the same land was granted to the defendants, who ejected the plaintiffs. Before the expiration of three years from the date of the application, the plaintiffs went to the office of the Minister of Lands and were told by a clerk there that it was useless to tender the balance of the purchase money. The plaintiffs, consequently, did not pay it into the Treasury. In an action of ejectment brought by the plaintiffs against the defendants, it was objected that the land had reverted to the Crown under s. 18 upon the default of the plaintiffs in the payment of the balance. *Held*, that the plaintiffs were entitled to maintain ejectment, because—(1), *per totam Curiam*, the land does not revert under s. 13 until the Crown has made a declaration of forfeiture; (2), *per Sir James Martin, C.J., and Sir W. Manning, J.*, because the Crown had dispensed with the tender of the balance by wrongfully issuing a lease and

repudiating the plaintiffs' title, and by the statement of the officer in the Lands Department that a tender would be useless.—*Martin and others v. Baker and others*. Supreme Court, 5th September, 1877. (*Ex relatione* Geo. Knox.)

Page 59, *Insolvency*, 25 Vic. No. 8, sec. 7.—See *Sandeman v. Robinson*, reported in *S. M. Herald*, 7 September, 1877—The Official Assignee of an insolvent sold by private contract an engine and fittings belonging to the estate of insolvent, but the Chief Commissioner declined to approve of the sale. *Held*, that no property in the engine, &c., passed to the purchaser (the defendant), because under this section no sale by private contract by an Official Assignee has any validity unless the assent of the Chief Commissioner has been first obtained.

Page 80, *Real Property Suits Limitation*.—Add to note of the case *Laing and others v. Bain and others*—The second new trial was held before Sir James Martin, C.J., in May, 1877, and a verdict was found for the defendants as to the homestead paddock in which Worrall's hut stood, and for the plaintiffs as to the residue of the grant. On a motion for a rule nisi for a new trial, on the ground of misdirection, the Court (Faucett, J., *dissentiente*) refused the rule. Sir James Martin, C.J., had directed the jury that the evidence of any acts of possession done subsequently to the commencement of the period of twenty years before action brought was immaterial; that for the purpose of shewing a possessory title, the same particularity was required in defining the area and boundaries of the land as would be required in showing a title under a deed of conveyance; that certain acts, such as putting up fences, &c., did not amount to possession, unless done with the intention of excluding all comers from the land.—2, Knox, S. C. C., p. 264; see also S. C. on motion to appeal to the Privy Council, *ib.*, p. 284.

Page 255, *Index, Real Property Act* add "*Power of Appointment* may be created or executed by a registered proprietor under 85th section, p. 104."

A COLLECTION

OF

ACTS RELATING TO THE TRANSFER OF OR DEALING WITH LAND.

ACTS SHORTENING ACTS. (*)

16 Vic. No. 1. An Act for shortening Acts of the Legislative Council.
[26th July, 1852.]

BE it enacted and declared by His Excellency the Governor of New South Wales, by and with the advice and consent of the Legislative Council thereof, as follows—

1. Every Act of the said Governor and Legislative Council of New South Wales, to be passed after the commencement of this Act, may be altered, amended, or repealed in the same Session of Council, (†) any law or usage to the contrary notwithstanding.

Acts of the Governor and Council may be altered, &c., in the same Session.

2. Such Acts shall be divided into sections, if there be more enactments than one, which sections shall be deemed to be substantive enactments, without any introductory words.

Acts to be divided into sections without introductory words.

3. All Acts of the Governor and Legislative Council (†) of New South Wales, including prospective enactments, may be referred to by the term "Act of Council"; and when any Act of Parliament, or any former Act of Council, or any section therein, shall be referred to in any Act, it shall be sufficient to cite the same by the year of the reign in which such Act was made, and the chapter or number of such Act, and the number of such section, without reciting the title of such Act or the provisions of such section so referred to; and the references in all cases shall be made according to the copies of such Acts printed by the Government Printer: Provided that, where it is only intended to amend or repeal a portion only of a section, it shall still be necessary either to recite such portion, or to set forth the matter or thing intended to be amended or repealed.

References to former enactments.

4. Wherever any Act shall be made repealing in the whole or in part any former Act, and substituting some provision or provisions in lieu thereof, such provision or provisions so repealed shall remain in force until the substituted provision or provisions shall come into operation by force of the last-made Act; and such repeal shall not, without express words, affect any act, matter, or thing commenced to be done under the repealed Act, but the same may be continued under the said repealed Act, unless the provisions of the repealing Act shall be adapted to such continuation. (‡)

Repealed enactments.

5. Every Act made after the commencement of this Act shall be deemed and taken to be a Public Act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such Act.

All Acts to be deemed Public Acts.

6. In all Acts, words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural, and the plural the singular, unless the contrary as to gender or number is expressly provided; and the word "person" or "party" to include bodies politic or corporate as well as individuals, if the context be applicable thereto; and the word "month" to mean calendar month, unless words be added showing lunar month to be intended; and the word "land" shall include messuages, tenements, and hereditaments corporeal or incorporeal of any tenure or description, and whatever may be the estate or interest therein, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure, or to some particular estate or interest; and the word "estate" shall include any estate or interest, charge, right, title, claim, demand, lien, or incumbrance at Law or in Equity, unless a more limited meaning is indicated by the context; and the words "oath," "swear," and "affidavit," shall include affirmation, declaration, affirming, and declaring in the case of persons by law allowed to declare or affirm instead of swearing.

Interpretation of certain words in Acts.

7. Whenever the word "Her" or "His" Majesty shall be used in any Act, the same shall be taken to include the Successors to the Crown of England; and whenever the word "Governor" shall be used, the same shall be construed to mean the Governor or

Meaning of the words "Her Majesty," "Governor," &c.

(*) It has been thought advisable to print these Acts *in extenso*, although many of the sections contain provisions not akin to the subjects treated in this collection.

(†) See 22 Vic. No. 12, s. 1, *post*, p. 3.

(‡) See 22 Vic. No. 12, s. 4, *post*, p. 3.

ACTS SHORTENING ACTS.

other person for the time being lawfully administering the Government of this Colony; and whenever any person holding or occupying a particular office or position shall be mentioned or referred to in general terms, such mention or reference shall be taken to include all persons who shall at any time thereafter occupy for the time being the said office or position, unless a contrary intention shall appear.

Words "in for or of the Colony of New South Wales" to be implied.

8. When any officer or office is referred to in any enactment, the same shall be taken to refer to the officer or office of the description designated within and for the Colony of New South Wales; and all reference to localities, jurisdictions, and other matters and things shall be taken to relate to such localities, jurisdictions, and other matters and things within and of the said Colony, unless in any such case the contrary shall appear to have been intended by the Legislature.

Power to appoint implies power to remove re-appoint, &c.

9. Whenever power shall be given by any Act to Her Majesty, or to the Governor of the Colony or to any officer or person to make appointments to any office or place, it shall, unless there are words to show a contrary intention, be intended that such power shall be capable of being exercised from time to time as occasion may require, and that Her said Majesty and the said Governor or such officer or person shall have power to remove or suspend the person appointed, and to appoint permanently or temporarily, as the case may require, another person in his stead, or in the place of any deceased, sick, or absent holder of such appointment.

From time to time.

10. Whenever power shall be given to do, perform, or submit to any act, matter, or thing, such power shall be capable of being exercised from time to time as occasion may require, unless the nature of the thing or the words used shall indicate a contrary intention.

Power to revoke and alter rules and regulations to be inferred from power to make them.

11. In every enactment whereby power shall be given to any officers or persons to make any rules, orders, or regulations, it shall be implied that such officers or persons may revoke, alter, or vary the same from time to time, as occasion may require, unless the terms used, or the nature and objects of the power, shall indicate that such power is intended to be exercised finally in the first instance.

Power to administer oath implied from power to hear and determine.

12. Whenever any Court, Judge, Justice, Officer, Commissioner, Arbitrator, or other person shall be authorized by law, or by consent of parties, to hear and determine any matter or thing, such Court, Judge, Justice, Officer, Commissioner, Arbitrator, and other person shall have authority to receive and examine evidence, and are hereby empowered to administer an oath to, or take an affirmation from, all such witnesses as are legally called before them respectively.

False oath or affirmation or declaration punishable.

13. In all cases in which an oath or affirmation shall be authorized to be administered or taken, any false evidence given by a party to whom such oath shall have been administered, or who shall have made such affirmation, shall be deemed to be a misdemeanor, and punishable as perjury; and in all cases where a solemn declaration shall be required to be taken or authorized to be received, a false declaration made by any person shall be deemed to be a misdemeanor and punishable with fine or imprisonment at the discretion of the Court before which such misdemeanor shall have been tried.

All judicial powers conferred on Justices to be exercised summarily.

14. Whenever by any Act any penalty, fine, or forfeiture is made recoverable before, or is authorized to be imposed by or before, any Justice or Justices of the Peace otherwise than in General or Quarter Sessions, and whenever by any Act a Justice or Justices is or are empowered to hear and determine otherwise than in General or Quarter Sessions, any matter, or to make any order, or do any act of a judicial character, such Act shall be taken to empower such Justice or Justices to adjudicate, order, and act therein accordingly in a summary way; and such Act shall be taken to have enacted that no conviction or order made by any Justice or Justices of the Peace under the authority of said Act, shall be quashed for want of form.

Appropriation of penalties when Act silent.

15. Whenever any fine, penalty, or forfeiture shall be imposed or authorized to be imposed by any Act of Council, such Act shall be taken to provide that the same when recovered shall be paid, one moiety to Her Majesty, Her Heirs, and Successors, for the public uses of this Colony, and in support of the Government thereof, and that the same shall be applied in such manner as may from time to time be directed by any Act or Acts of the Governor and Legislative Council of New South Wales; and that the other moiety thereof shall be paid to the informer or person prosecuting or suing for the same, unless the Act imposing the said fine, penalty, or forfeiture shall otherwise direct.

Who may in general sue for penalties.

16. Any fine, penalty, or forfeiture so imposed may be sued and proceeded for by any person whomsoever, unless by the Act imposing the same such right to sue or proceed shall be expressly given to any officer or person by name or designation.*

No private Act to affect property of Crown or individuals not named.

17. Whenever any Act of Council shall be passed in the nature of a Private Act, and whereby the property of any individual may be affected, nothing herein contained shall be deemed to affect the rights of Her Majesty, Her Heirs, or Successors, or of any bodies politic or corporate, or of any person excepting those at whose instance, or for whose especial benefit, such Act may have been passed, and those claiming by, through, or under

* See as to Remission of Penalties, 33 Vic. No. 13.

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3

them ; but all such rights shall be deemed to be saved in any such Act, in the same manner as if a proviso for that purpose had been expressly contained therein and enacted thereby.

18. This Act shall commence and take effect from and immediately after the passing thereof. Commencement of Act

22 Vic. No. 12. An Act to amend and extend the Act passed for shortening Acts of the Legislature. [7th October, 1858.]

WHEREAS doubts have arisen whether the Act passed in the sixteenth year of Her Majesty's reign, intituled "*An Act for shortening Acts of the Legislative Council*" extends to or will embrace Acts passed or to be passed by the Legislature as at present constituted, and whether Acts commence by law (where no time is expressed) from the day of their receiving the Royal Assent or at an earlier date, and it is expedient to remove those doubts, and also to amend the said Act in some particulars : Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same as follows :—

1. The several provisions of the said Act, applicable to Acts of Council, shall extend to every Act passed or to be passed by the Legislature of this Colony for the time being, however constituted, and the term "Session of Council" shall be taken to mean any Legislative Session. And every Act passed in this Colony, by whatsoever Legislature, may be cited or referred to by the words "Act passed in this Colony," or by the term "Act of the Legislature of New South Wales" : Provided that the word "Act" alone when used to indicate an Enactment, shall equally be taken to mean an Act of the Legislature of this Colony, unless that construction be inconsistent with the context. Preamble.
16 Vic. No. 1.
Provisions of the said Act extended to all enactments.

2. Every Act heretofore or hereafter passed by the Legislature for the time being, shall be deemed to have commenced and shall take effect on the day on which such Act received or shall receive the Royal Assent, unless a contrary intention be expressed therein. And the date purporting to be that of such Assent which shall appear on the copy of any such Act printed by the Government Printer, or purporting so to be, or which shall be printed on the copy of any such Act in the *Gazette*, shall be received for all purposes as evidence of the date of such Assent, and be judicially taken notice of. Time of commencement of Acts.

3. Provided, that every Act reserved for the signification of Her Majesty's pleasure thereon, shall commence only on the day on which the fact of Her Majesty's Assent shall be proclaimed by the Governor in the *Gazette*, or on such day thereafter, if any, as the Act itself shall have prescribed. Proviso.
Reserved Acts.

4. The repeal of an Enactment by which a previous Enactment was repealed, shall not have the effect of reviving such last-mentioned Enactment without express words : And neither the repeal nor the expiration of an Enactment shall affect any civil proceeding previously commenced under the same, but every such proceeding may be continued, and every thing in relation thereto be done in all respects as if the Enactment continued in force. Repealed or expired enactments.

5. Every Act amending an Act shall be construed with the amended Act and as part thereof, unless the contrary be declared in the amending Act. Amending Acts.

6. The word "*Gazette*" used in this or any other Act shall be understood to mean the *New South Wales Government Gazette*, and the words "Petty Sessions" shall be understood to mean the Justices of the Peace assembled at any Court of Petty Sessions, or sitting in Sessions not being any General or Quarter Sessions. And every Proclamation or order by the Governor, with the advice of the Executive Council, whether before or after the passing of this Act, made or purporting to be made in pursuance of any Act or Statute and published in the *Gazette*, shall be judicially taken notice of. Orders in Council, &c.
Terms "*Gazette*" and "*Petty Sessions*."

7. In all indictments and informations, and all pleadings and proceedings, civil or criminal, the word "Statute" or the word "Act," used to indicate an Enactment, shall equally be taken to mean and include an Act of the Imperial Parliament, or an Act of the Legislature of this Colony,—as the context or the case may require. Term "Act" or "Statute."

8. Where in any enactment passed after the present Session, a power is conferred on any officer or person by the word "may," or by the words "it shall be lawful," or the words "shall and may be lawful," applied to the exercise of that power, such word or words shall be taken to import that the power may be exercised or not at discretion ; but where the word "shall" is applied to the exercise of any such power, the construction shall be that the power conferred must be exercised. When a power is discretionary and when not.

9. Whenever a power is conferred or duty imposed by any Act upon any person by virtue or in the exercise of any public office or employment, and such person is sued in respect of anything done by him, which he shall allege to have been done in pursuance thereof, he may plead the general issue (with or without any other plea or pleas) and give the special matter in evidence under that plea ; and if he succeeds in the action such For protection of public officers.

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person shall recover costs as between attorney and client: Provided, that he shall at the foot of his plea state the particular Act, and section or sections, upon which he intends to rely, and no other Enactments shall at the trial be relied on by him.

Courts of
General Sessions.

10. The term "Quarter Sessions" or "General Quarter Sessions" in any Act now or hereafter passed shall be taken equally to include a Court of General Sessions of the Peace, and every such Court periodically sitting and ordinarily presided over by the Chairman of Quarter Sessions, or any Judge of a District Court acting as Chairman, shall be deemed to have had, and shall have, the same jurisdiction and authority both in civil and in criminal cases as a Court of General Quarter Sessions.

Reckoning of
time.

11. The time prescribed or allowed in an Act for the doing of a particular thing shall, in all cases, be taken to exclude the day of the act or event from or after which the time is to be reckoned, but shall include the day for the doing of that thing: Provided, that where that day falls on a Sunday, or on Christmas Day, or Good Friday, the thing may be done on the day following; and distance of space mentioned or indicated in an Act shall be computed according to the nearest road ordinarily used in travelling, unless measurement in a direct line be expressed or that construction be rendered necessary by the context.

ADVANCEMENT OF JUSTICE.

5 Vic. No. 9. An Act for the further amendment of the Law and for the better advancement of Justice. [28th September, 1841.]

Executors of
lessor may dis-
train.

27. And be it enacted, That it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term or at will for arrears of rent due to such lessor or landlord in his life-time, in like manner as such lessor or landlord might have done; and such arrears may be distrained for after the end or determination of such term or lease in the same manner as if it had not been determined: Provided that such distress be made within six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due, and that all provisions in force by law relating to distresses for rent shall be applicable to every distress so made.

Executors to pay
costs.

28. And be it enacted, That in all actions hereafter brought by executors or administrators in right of their testator or intestate, such executors or administrators (unless the Court or a Judge shall otherwise order) shall be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against them, and in all other cases in which they would be liable to costs if suing upon a cause of action accruing to themselves in their own right, and the defendant shall have judgment for such costs accordingly.

Actions by and
against execu-
tors for injuries
in testator's life-
time.

30. And be it enacted, That actions of trespass or on the case, may be maintained by executors or administrators, for any injury to the real estate of their testator or intestate, committed in his life-time, for which the like actions might have been maintained by him: Provided that every such action shall be brought within one year after the death of such testator or intestate, and that the injury shall have been committed within six calendar months before his death, and the damages, when recovered, shall form part of the deceased's personal estate; and the like actions may be maintained against executors or administrators, for any wrong committed by their testator or intestate to another, in respect of his property real or personal: Provided that every such action shall be brought within six months after such executors or administrators shall have taken on themselves the administration of the estate of the deceased, and that the injury shall have been committed within the like period preceding his death, and the damages recovered in such action shall be payable in like order of administration as the deceased's simple contract debts.

Sheriff may sell
equities of re-
demption.

31. And be it enacted, That after the passing of this Act it shall be lawful for the Sheriff, to whom any writ of *feri facias* issued out of the Supreme Court shall be directed (and for the Deputy Sheriff within the District of Port Phillip), to take in execution, and cause to be put up for sale, and sold under such writ, any equity of redemption, or other equitable interest, or any chose in action⁽¹⁾, of or belonging to the defendant therein named; and every such sale (the same being by public auction only, and, in cases of equity of redemption being previously advertised in the *New South Wales Government Gazette*, and in one or more newspaper or newspapers, at least one calendar month before the same shall take place), shall be as valid and effectual, to pass all such defendant's right and title to, and interest in, such equity or equitable interest or chose in action, as if the same had been conveyed or assigned to the purchaser by

(1) So much of this section as authorizes the Sheriff to sell under a writ of *fi. fa.* any chose in action belonging to the defendant is repealed by 12 Vic. No. 1, s. 5.

such defendant himself : Provided that where any such equity or equitable interest or chose in action shall relate to real estate; a deed of "bargain and sale" thereof, or of such defendant's right and title to and interest therein, shall be executed by such Sheriff, or Deputy Sheriff, to such purchaser, and be by him duly registered within one calendar month next after such sale.

33. And be it enacted, That in every case where, after the passing of this Act, any debtor resident in this Colony shall execute any conveyance or assignment by deed to a trustee or trustees of all his estate and effects whatsoever for the benefit of all his creditors, ⁽¹⁾ (to be named in a schedule annexed to such deed, with the amounts due to them respectively), and such deed shall be executed by such debtor and trustee or trustees, and by the majority in number and in value of such creditors, or by the agents of such of them as shall be absent from the Colony, the person of such debtor, from and after the publication of such notice as is hereinafter mentioned, shall be absolutely free from arrest in execution at the suit of any creditor named in such schedule, in respect of any debt or sum therein included, and if, nevertheless, arrested by any such creditor, he shall (on proof of the facts to the satisfaction of any Judge of the Supreme Court) be discharged from custody, with or without costs, to be paid by the plaintiff, as such Judge shall think fit to order : Provided that no creditor whose debt is under fifty pounds shall (under this or the succeeding sections) be reckoned in number, but such debt shall be computed in value only : Provided also, that with respect to debts due on any outstanding bill of exchange or promissory note, the actual holder of which shall then be unknown, it shall be sufficient, if that fact be stated in the schedule, with the amount of such bill or note, and the date when the same will fall due, to give the name of the last-known holder, and the names of the immediate parties thereto.

Assignments in trust for creditors; provision as to outstanding bills.

34. Provided always, and be it enacted, That every such deed shall be executed by such debtor and trustee or trustees respectively, in the presence of, and shall be attested by, some Justice of the Peace, and that a notice of the same, attested in like manner (and stating truly where such deed is lying for inspection and execution), shall, within fourteen days next after such execution, be published in the *Government Gazette* and one other newspaper published at Sydney, or (if the debtor be resident within the District of Port Phillip) in not less than two newspapers published at Melbourne in that district : Provided also that there shall be annexed to every such deed a true and particular account of all the property of every description (wearing apparel and necessaries to an amount not exceeding twenty-five pounds only excepted) of which the debtor is possessed, or any person in trust for him, or to which he or any such person is entitled, legally or equitably, in possession, reversion, or expectancy, so far as such debtor can set forth the same, and that in case any part of such property be real estate situate in this Colony, a memorial of the deed, accompanied by a copy of such last-mentioned schedule, shall, within the like period of fourteen days, be duly registered. ⁽²⁾

Proceedings in respect of such assignments.

Contents of assignment.

35. Provided also, and be it enacted, That no such deed as aforesaid, nor any deed of the like nature, shall be valid, ⁽³⁾ if containing any provision for enabling the debtor to retain possession of his property (except as aforesaid), or any part thereof, or to carry on his business (other than for the purpose of winding up the same), or for releasing him from his debts without full payment of the same, or for making him any allowance out of such property or business, unless such deed shall have been executed by not less than four-fifths in number and in value of his creditors ; but that where any deed shall be so executed as last aforesaid (whether at the time of, or subsequently to, and in connexion with, such conveyance or assignment as first aforesaid), the same and the several provisions therein shall be binding on all the creditors named in such schedule as aforesaid, whether assenting or not.

Special provisions.

⁽¹⁾ A deed of assignment of all the debtor's property for the benefit of all his creditors, executed under the provisions of the 33rd and following sections, is not invalid because of the accidental omission from the schedule attached to the deed of the name of a creditor for the sum of £17 13s. 9d., it appearing that he was such creditor as well as a debtor in the sum of £30 9s. *Nathan v. Field*, 3, S.C.R., p. 95 ; see also *Shoveller v. Ramsay*, ib. p. 99 ; and *Levy v. Smith*, ib. p. 290.

⁽²⁾ The omission to register a deed of assignment including a real estate renders the deed invalid. *In re Kirchner's Trustees*, 5, S.C.R., p. 346.

⁽³⁾ A deed of assignment of all the estate of the debtor for the benefit of all his creditors, which contains a covenant to release the debtor, but is not executed by four-fifths in number and value of the creditors is not valid as against an execution creditor, whose writ is lodged with the Sheriff. Such a provision renders the deed invalid within the meaning of the 35th section of the 5 Vic. No. 9, notwithstanding the insertion of a proviso in the deed, that any such release shall be void in the event of the deed not being executed by four-fifths in number and value of the debtor's creditors (*per Hargrave, J., and Faucett, J.*). *Manson v. Levy*, 8, S.C.R., p. 38.

ADVANCEMENT OF JUSTICE.

Deeds may be set aside for fraud or wilful error or omission in schedule.

Effect given to all such assignments.

Limitation of certain actions of debt, &c. (3 & 4 William IV. cap. 42 sec. 3.)

Infants and persons beyond sea, &c. (*Ibid.*, sec. 4.)

Proviso as to acknowledgments. (*Ibid.*, 5.)

36. Provided further, and be it enacted, That every such deed shall, at the instance of any creditor, on application to be made to the Court in a summary way for that purpose, be liable to be set aside for fraud or for any wilful and material error or omission in either of the schedules annexed to the conveyance or assignment as aforesaid, or (at the discretion of the Court) the debtor shall in such case be deprived of all claim under any such deed, and of every benefit thereby, or by this Act, intended in that behalf to have been conferred upon him.

37. And be it enacted, That after the execution of any such deed as aforesaid, and after the publication of such notice thereof, as in that behalf is hereinbefore required, all and singular the property of the debtor having executed such deed, of any description whatsoever, and all his rights and credits, including all debts due to him, shall be absolutely vested in the trustee or trustees therein named for the purposes in and by such deed declared, ⁽⁹⁾ and such trustee or trustees may recover all such property, and sue for and recover all such debts, in his, or their own name or names; and every warrant of attorney, or *cognovit actionem* executed or given, and every assignment, or delivery, or sale of goods by such debtor, for or on account of, or in satisfaction, or part satisfaction, or as security of or for any antecedent debt due to any creditor or creditors, such warrant of attorney, or *cognovit*, or assignment, or delivery, or sale of goods, being within sixty days preceding the date of the first publication of such notice as aforesaid, shall, as against the creditors having signed such deed as aforesaid, or who shall afterwards sign the same, be and be adjudged and taken to be fraudulent and void; and all such goods as last aforesaid (or the then value thereof in case of any sale or transfer to a third party), may be recovered accordingly by the trustee or trustees in such deed named from the creditor or creditors having taken the same for the benefit of all the creditors.

39. And be it enacted, That after the passing of this Act all actions of debt for rent upon any indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and all actions of debt upon any award where the submission is not by specialty or for money levied under *feri facias*, and all actions for penalties, damages, or sums given to the party grieved by any law now or hereafter in force in this Colony, shall be commenced and sued within the time and limitation hereinafter expressed but not afterwards, that is to say, the said actions of debt for rent or covenant, or debt upon any bond or other specialty, and actions of debt or *scire facias* upon recognizance, within ten years after the passing of this Act or within twenty years after the cause of such actions; the said actions by the party grieved, within one year after the passing of this Act or within two years after the cause of such actions; and the said other actions within three years after the passing of this Act or within six years after the cause of such actions: Provided that nothing herein contained shall extend to any actions given by any Act or Statute, where the time for bringing such action is, or shall be, thereby specially limited.

40. And be it enacted, That if any person entitled to any such action or *scire facias*, shall be at the time the cause of action accrued, within the age of twenty-one years, feme covert, *non compos mentis*, or beyond sea, then such person shall be at liberty to commence the same action within such times after being of full age, discover, of sound memory, or returned from beyond sea, as other persons having no such impediment should have done; and if any person against whom there shall be any such cause of action, shall be at the time such action accrued, beyond sea, then the party entitled to any such cause of action shall be at liberty to bring the same against such person, within such times as are before limited after the return of such person from beyond sea.

41. Provided always, That if any acknowledgment shall have been made, either by writing signed by the party liable under any such indenture, specialty, or recognizance, or his agent, or by part payment or satisfaction on account of the principal or interest due thereon, it shall be lawful for the person entitled to such actions, to bring his action for the money remaining unpaid and so acknowledged, within twenty years after such acknowledgment, or part payment, or satisfaction; or in case any person entitled to such action shall, at the time of such acknowledgment, be under disability as aforesaid, or the party making such acknowledgment shall then be beyond sea, then within twenty years after such disability shall have ceased, or such party shall have returned from beyond sea, as the case may be; and in answer to a plea of this Act, the plaintiff in any such action, may reply such acknowledgment, and that such action was brought within such time as aforesaid.

⁽⁹⁾ An assignment deed having been executed under 5 Vic. No. 9, sect. 37,—*Held*, that commission earned by an executor who was the assignor, and allowed under sect. 17 of the Charter of Justice, would not pass to the trustees of the assignment deed (Milford, J., however, seeming inclined to think that in Equity the trustees would be entitled to such commission). *Moss v. Barnett*, 1, S. C. R., p. 313.

ALIENS.

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ALIENS.

39 Vic. No. 19. An Act to amend the Law relating to Aliens. [Reserved, 29th June, 1875. Assent notified in *Gazette* of 26th May, 1876.]

WHEREAS by the Imperial Statute of the thirty-third year of Her present Majesty, Preamble. intituled "*An Act to amend the Law relating to the Legal Condition of Aliens and British Subjects*," it is enacted that all laws, statutes, and ordinances, which may be duly made by the Legislature of any British Possession for imparting to any person the privileges or any of the privileges of naturalization, to be enjoyed by such person within the limits of such Possession, shall within such limits have the authority of law, but shall be subject to be confirmed or disallowed by Her Majesty, in the same manner, and subject to the same rules, in and subject to which, Her Majesty has power to confirm or disallow any other laws, statutes, or ordinances, in that Possession: And whereas it is expedient to amend the Law of this Colony relating to Aliens, in order that the same should, as far as practicable, be assimilated to that in force in the United Kingdom, Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

1. This Act shall come into force on the first day of January, one thousand eight hundred and seventy-six, and may be cited for all purposes as the "*Naturalization Act of New South Wales*." Commencement and short title.

2. The Acts of the eleventh and seventeenth years of Her present Majesty, intituled respectively "*An Act to amend the Laws relating to Aliens within the Colony of New South Wales*," and "*An Act to amend the Act relating to the Naturalization of Aliens*," are hereby repealed; but such repeal shall not operate in derogation or prejudice of any right, title, or capacity, whether vested, contingent, or acquired, under either of the said Acts prior to the passing of this Act, nor shall such repeal affect any liability, or penalty, or forfeiture, accrued or incurred before the passing of this Act, or the institution of any investigation or proceeding for ascertaining or enforcing any such liability, penalty, or forfeiture. Repeal of 11 Vic. No. 39 and 17 Vic. No. 8.

3. Real and personal property of every description in New South Wales may be taken, acquired, held, and disposed of, by an alien, in the same manner in all respects as by a natural-born British subject, and a title to any such property may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to, a natural-born British subject. But nothing in this section contained— Capacity of aliens as to real and personal property.

- (1.) Shall qualify an alien for any office, or extend or be construed to confer any Parliamentary, Municipal, or other Franchise, in New South Wales.
- (2.) Shall qualify an alien to be the owner of a British ship.
- (3.) Shall affect any estate or interest in real or personal property in the said Colony to which any person has, or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this Act, or in pursuance of any devolution by law on the death of any person dying before the passing of this Act.
- (4.) Or shall entitle an alien to any right or privilege as a British subject in the said Colony, except such rights and privileges in respect of property, or otherwise, as are hereby expressly given or extended to him.

4. An alien who has resided in New South Wales for a term of not less than five years, within such limited time before making the application hereinafter mentioned, as may be allowed by the Governor, either by general order, or on any special occasion, and who intends when naturalized to reside in the said Colony, may apply to the Governor for a certificate of naturalization. The applicant shall produce, in support of his application, his own statutory declaration, stating his name, age, birthplace, occupation, and residence, also a like declaration of some other person as to the applicant's term of residence within the said Colony, and give such further evidence of the completion by him of the said term of residence and of his intention to reside in the Colony, as the Governor may require, who, if satisfied with the evidence adduced, shall take the applicant's case into consideration, and may, with or without assigning any reason, give or withhold a certificate, as he thinks most conducive to the public good. And no appeal shall lie from his decision; but no such certificate shall have any effect until the applicant has taken the oath of allegiance hereinafter prescribed. Certificate of naturalization.

5. If the Governor think fit to grant such certificate of naturalization, he shall direct the applicant to take the oath of allegiance prescribed by this Act, before some Judge of the Supreme Court or of a District Court, or before some Police Magistrate or Justice of the Peace; and upon the certificate of such Judge, Police Magistrate, or Justice, that the applicant has taken before him the said oath, he shall issue to the applicant a certificate of naturalization accordingly. Oath of allegiance, before whom taken.

6. Every person to whom a certificate of naturalization, under this Act, or the Act eleven Victoria number thirty-nine hereby repealed, has been granted, shall, in this Colony Effect of certificate of naturalization.

ALIENS.

be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in this Colony, anything in the "Constitution Act," seventeen Victoria number forty-one section two—the "Electoral Act of 1858," twenty-two Victoria number twenty sections eight and nine—or the "Jury Act of 1847," eleven Victoria number twenty section three, to the contrary notwithstanding.

Status of married women and of children of aliens.

7. Every married woman shall in this Colony be deemed to be a subject of the State of which her husband is for the time being a subject. And every alien woman, married to a natural-born British subject or person who shall have obtained a certificate of naturalization under this or the last-mentioned Act, shall be deemed to be herself naturalized, and to have had in this Colony, from the time of her marriage, all the rights and privileges of a natural-born British subject. Every child under the age of sixteen years, whose father or mother shall, at the time of the birth of such child, have been an alien, but shall have afterwards obtained a certificate of naturalization, or whose mother being an alien shall have married a natural-born British subject, shall, if such child shall have been resident in this Colony at any time while under that age, be deemed naturalized, and to have all the rights and privileges of a natural-born British subject.

Persons naturalized in other British Colonies may be naturalized in this Colony.

8. When any person resident in this Colony has previously obtained any certificate of naturalization in the United Kingdom, or in any British Colony, and desires to be naturalized in this Colony, if he submit such certificate to the Governor, and if he further satisfy the Governor that he is the person named in such certificate, and that the same has been obtained without any fraud or intentional false statement, and that the signature and the seal (if any) thereto, are, to the best of his belief and knowledge, genuine, the Governor may, at his discretion, grant a certificate of naturalization, without requiring from the applicant any further residence in this Colony or other condition.

Record of certificate, &c.

9. The Colonial Secretary shall enrol for safe custody, as of record, all certificates of naturalization granted under this Act, and shall demand and receive from every person to whom such certificate is granted, the fee of one pound in respect of such enrolment, and shall cause to be made proper indices to such certificates, and shall permit every person desirous of so doing, at all reasonable times, to inspect the same, and make copies of such certificates, on payment of the fee of one shilling for every such inspection; and no person to whom any such certificate is granted, shall be liable to any other fees or charges for such certificate, enrolment, or otherwise.

Form of oath of allegiance.

10. The Oath in this Act referred to as the Oath of Allegiance shall be in the form following, that is to say—

"I do swear that I will be faithful and bear true allegiance
"to Her Majesty Queen Victoria Her Heirs and Successors according to law :
"So help me GOD."

Certificate of naturalization, how proved.

11. A certificate of naturalization may be proved in any proceeding in any Court, by the production of the original certificate, or of any copy thereof, certified to be a true copy under the hand of the Colonial Secretary.

Interpretation.

12. In the construction of this Act, the word "Governor," where hereinbefore used, shall mean "Governor with the advice of the Executive Council."

ALIENATION (BY WIFE, OF LAND OF DECEASED HUSBAND, WHEN VOID).

11 Henry VII. c. 20. [1494.]

[This statute is given in substance in Watkins on Conveyancing, page 448. It was repealed, *sub modo*, in England, by the "Fines and Recoveries Abolition Act," 8 and 4 Wm. IV. c. 74, sec. 17 (not in force in this Colony), and was commonly known as the "Statute of Jointures."]

ALIENATION (OF CROWN LANDS).

(See in *Appendix*.)

ANNE (STATUTE OF).

4 Ann cap. 16. An Act for the amendment of the Law and the better advancement of Justice. [1705.]

All grants and conveyances to be good, without attornment of tenants.

9. And be it further enacted by the authority aforesaid, That from and after the said first day of Trinity Term, all grants or conveyances thereafter to be made, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, to all intents and purposes, without any attornment

of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made. (*)

10. Provided nevertheless, That no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee. Proviso.

14. And whereas by an Act of Parliament made in the twenty-ninth year of King Charles the Second, intituled "*An Act for prevention of Frauds and Perjuries*," it is enacted, That no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of Thirty pounds, that is not proved by the oaths of three witnesses, at the least, that were present at the making thereof; it is hereby declared, That all such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereunto. Nuncupative wills.

21. And be it further enacted by the authority aforesaid, That all warranties which shall be made after the said first day of Trinity Term, by any tenant for life, of any lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void and of none effect; and likewise all collateral warranties, which shall be made after the said first day of Trinity Term, of any lands, tenements, or hereditaments, by any ancestor who has no estate of inheritance in possession in the same shall be void against his heir. Warranty by tenant for life void (*)

ASSIGNMENT DEEDS (FOR BENEFIT OF CREDITORS).

(See *Advancement of Justice*.)

ATTAINDER.

[On this subject and the kindred subjects of Escheats and Forfeitures, the following statutes may be consulted:—8 Hen. VI c. 16; 18 Hen. VI c. 6; Anne I c. 7; 39 and 40 Geo. III c. 88; 54 Geo. III, c. 145; and 1 Geo. IV c. 1, together with section 10 of the "*Inheritance Act*." The subjects of forfeiture and escheat are treated at length in *Chitty's Prerogatives of the Crown*; see also *Watkins' Conveyancing*, page 469. The statutes above cited are not considered of sufficient practical utility to warrant any more space being devoted to them in this collection than is sufficient for the purpose of reference.]

ATTORNMENT.

See *Anne, Statute of* (4 Ann cap. 16.)

CHARTER OF JUSTICE.

(See in *Appendix*.)

COMMON LAW PROCEDURE. (†)

COMPANIES SEALS.

27 Vic. c. 19. An Act to enable Joint Stock Companies carrying on business in Foreign Countries to have Official Seals to be used in such countries. [13th May, 1864.]

WHEREAS there have been and may be established in the United Kingdom companies whose business is to be carried on in countries not situate in the United Kingdom, and it is convenient and desirable that investments may be made, and mortgages, conveyances and leases taken, and contracts and engagements entered into, on behalf of the company in such countries, in name of the company: Be it therefore enacted as follows:— Preamble.

1. This Act may be cited for all purposes as "*The Companies' Seals Act, 1864*."

Short Title.

(*) Warranties to bar estates tail and estates expectant thereon, were abolished in England by the 3 & 4 Wm. IV, c. 74 (not, however, in force in this Colony.)

(†) See the enactments in the Common Law Procedure Acts, 17 Vict. No. 21, ss. 119 to 171, and in the 20 Vict. No. 31, ss. 7, 24, and 57, relating to procedure in Ejectment.

(*) See *Mate v. Kidd*, 3, S. C. R., p. 200.

COMPANIES SEALS.

Power to companies to have an official seal.

2. Any company, under "The Companies Act, 1862," whose objects require or comprise the transaction of business, as hereinbefore mentioned, in foreign countries, may cause to be prepared an official seal for and to be used in any place, district, or territory situate out of the United Kingdom in which the business of the company shall be carried on, and every such official seal may and shall be a *fac-simile* of or as nearly as practicable a *fac-simile* of the common seal of the company, with the exception that on the face thereof shall be inscribed the name of each and every place, district, or territory in and for which it is to be used: Provided that it shall be lawful for any such company as aforesaid from time to time to break up and renew any official seal or seals and to vary the limits within which it is intended to be used.

Power to company to appoint agents abroad to affix seals.

3. Every company having or using any such official seal as is authorized by this Act may from time to time, by any instrument or instruments in writing under the common seal of the company, empower any agent or agents specially appointed for the purpose, or any local agent, board, committee, manager, or commissioner appointed under the provisions of the articles of association of such company, in any place, district, or territory situate out of the United Kingdom where the business of the company shall for the time being be carried on, to affix such official seal to any deed, contract, or other instrument to which the company is or shall be made a party in such place, district, or territory, and no other order of the company or the board of directors thereof shall be necessary to order any such seal to be affixed to any deed, contract, or other instrument.

As to the duration of powers granted under sec. 3 of this Act.

4. Every power granted under the last preceding section shall, as between the company, their successors and assigns on the one hand, and the person or persons dealing with the agent or agents, board, committee, manager, or commissioner named in the instrument conferring the power, and all parties claiming through or under such person or persons on the other hand, continue in force during the period, if any, mentioned in the instrument conferring the power, or if no power be there mentioned then until notice of the revocation or determination of the power shall have been given to such person or persons as aforesaid.

Persons affixing seal to document to certify the date when so affixed.

5. Whenever any such official seal as aforesaid shall be affixed to any document, the person affixing the same shall by writing under his hand, and written on the document to which the seal may have been affixed, certify the date when and the place where the same was affixed; and any document to which any such seal shall have been duly affixed within the district or territory or place, the name whereof is inscribed on such seal, shall bind the company in the same way and to the same extent and have the same force and effect as if it had been duly sealed with the common seal of the company.

Binding on the company.

Companies not to exercise powers of Act unless authorized.

6. The powers given by this Act shall be exercised by such companies only as are or shall be expressly authorized to exercise the same by their articles of association, or a special resolution passed according to the provisions of "The Companies Act, 1862," and shall be exercised by such companies subject to any directions or restrictions in their articles of association or the special resolutions contained.

7. Nothing in this Act contained shall operate to repeal the provisions of the fifty-fifth section of "The Companies Act, 1862," but such section shall continue in force, and all acts done or to be done thereunder shall be as valid and effectual as if this Act had not been passed.

CONVEYANCERS (CERTIFICATED).

11 Vic. No. 33. An Act to regulate the taxation of Attorneys' Bills of Costs and the practice of Conveyancing. [2nd October, 1847.]

Certain persons only to draw conveyances.

13. And be it enacted, That from and after the first day of January next, (*) every person who shall for or in expectation of any fee, gain, or reward, directly or indirectly, draw or prepare any conveyance, or other deed or instrument in writing, relating to any real estate, or any proceedings in Law or Equity, (other than and except Barristers, or Attorneys and Solicitors of the Supreme Court, or Certificated Conveyancers as hereinafter mentioned; and other than and except persons solely employed to engross any deed, instrument, or other proceeding, not drawn or prepared by themselves, and for their own account respectively; and other than and except Public Officers drawing or preparing official instruments applicable to their respective offices, and in the course of their duty,) shall be deemed guilty of a contempt of the Supreme Court, and shall and may be punished accordingly, for every such offence, upon the application of any person complaining thereof; or shall, for every such offence, forfeit and pay the sum of twenty pounds, to be sued for and recovered in a summary way before any two or more Justices of the Peace, and in accordance with the provisions of an Act passed in the fifth year of His late Majesty King William the Fourth, intituled "*An Act to regulate Summary Proceedings before Justices of the Peace.*"

5 WIL. IV No. 22.

(*) i.e., 1st January, 1848.

CONVEYANCES (FRAUDULENT).

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14. And be it enacted, That every person except a Barrister, or Attorney and Solicitor of the Supreme Court, who shall be desirous of practising as a conveyancer, shall, one month at least before making application as hereinafter mentioned, give notice in such manner and form as the Judges of the Supreme Court shall direct, of his intention to apply to the said Court for a certificate to practise as a conveyancer, and any person, having given such notice as aforesaid, shall be at liberty to apply to the said Court touching his fitness to practise as a conveyancer, and thereupon the Judges, or one of them, shall direct that the applicant shall be examined at the earliest convenient time by the Master in Equity of the said Court (or such other one or two officers of the Court as the Judges may appoint to assist him), touching his, the applicant's skill and knowledge in conveyancing, as well as to his character for integrity; and the said Master or his assistants shall be at liberty to put such questions to such applicant in respect to the matters aforesaid, and to require such proof of his character, as shall be deemed proper; and if the said applicant shall be considered of competent ability and knowledge, and a fit and proper person to practise as a conveyancer, then the said Master shall, and he is hereby empowered to grant a certificate to such applicant, authorizing him to draw, fill up, and prepare any conveyance, will, deed, bond, lease, or agreement for a lease, or other contract whatsoever, of or relating to any estate or property, whether real or personal; and every such certificate shall be enrolled in the office of the Registrar of the Supreme Court, whereupon such applicant shall be deemed a certificated conveyancer; and entitled to practise as such; with power of appeal to the Court in case of refusal of such certificate by the Master as aforesaid.

Certificate
conveyancers.
Notice.

Examination for
certificates.

CONVEYANCES. (*)

CONVEYANCES (FRAUDULENT).

13 Eliz., Cap. 5. An Act against Fraudulent Deeds, Giftes, Alienations, &c. [1570.](†)

For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore; which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others, of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and cheivance between man and man, without the which no commonwealth or civil society can be maintained or continued.

Fraudulent
deeds made to
avoid the debts
of others shall be
void and the
penalties, &c.

2. Be it therefore declared, ordained, and enacted, by the authority of this present Parliament, That all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices as is aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding. (?)

All fraudulent
conveyances
made to avoid
the debt or duty
of others shall
be void.

(*) For the Early Statutes under this head, see 1, Chitty's Statutes, p. 822, 3rd Edition.

(†) Made perpetual by 29 Elizabeth c. 5.

(?) A. executed a settlement after marriage in pursuance of a verbal agreement made before marriage. At the time of execution an action by B. was pending, in which B. subsequently obtained a verdict, which he was unable to realize owing to the settlement. There had been conversations showing that A. intended that B. should get nothing, if he obtained a verdict. *Held*, that under the circumstances the settlement was fraudulent and void. *Perry v. Muir*, 2, S. C. R., Eq., 1.

CONVEYANCES (FRAUDULENT).

The forfeiture of the parties to fraudulent deeds.

8. And be it further enacted by the authority aforesaid, That all and every the parties to such feigned, covinous, or fraudulent feoffment; gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions and other things before expressed, and being privy and knowing of the same or any of them, which at any time after the tenth day of June next coming shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had or made *bond fide* and upon good consideration; or shall alien or assign any the lands, tenements, goods, leases or other things before mentioned to him or them conveyed as is aforesaid, or any part thereof,—shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments, leases, rents, commons, or other profits of or out of the same; and the whole value of the said goods and chattels, and also so much money as are or shall be contained in any such covinous and feigned bond, the one moiety whereof to the Queen's Majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges and other charges aforesaid, to be recovered in any of the Queen's Courts of record by action of debt, bill, plaint or information, wherein no essoin, protection or wager of law shall be admitted for the defendant or defendants; and also being thereof lawfully convicted, shall suffer imprisonment for one half-year without bail or mainprize.

Who shall have the forfeiture and by what means.

Estates made upon good consideration and *bond fide*.

6. Provided also, and be it enacted by the authority aforesaid, That this Act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and *bond fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud, or collusion, as is aforesaid; anything before mentioned to the contrary hereof notwithstanding.

27 Elizabeth cap. 4. An Act against Covinous and Fraudulent Conveyances. [1585.]

Preamble.

FORASMUCH as not only the Queen's Most Excellent Majesty, but also divers of Her Highness's good and loving subjects, and bodies politic and corporate, after conveyances obtained or to be obtained, and purchases made or to be made, of lands, tenements, leases, estates and hereditaments, for money or other good considerations, may have, incur and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates gifts, grants, charges and limitations of uses heretofore made or hereafter to be made, of, in or out of lands, tenements, or hereditaments so purchased or to be purchased; which said gifts, grants, charges, estates, uses and conveyances were, or hereafter shall be, meant and intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased or shall purchase the same; or else by the secret intent of the parties the same be to their own proper use, and at their free disposition, colored nevertheless by a feigned countenance and show of words and sentences, as though the same were made *bond fide*, for good causes, and upon just and lawful considerations.

Fraudulent conveyances made to deceive purchasers shall be void.

2. For remedy of which inconveniences, and for the avoiding of such fraudulent, feigned and covinous conveyances, gifts, grants, charges, uses and estates, and for the maintenance of upright and just dealing in the purchasing of lands, tenements and hereditaments, Be it ordained and enacted by the authority of this present Parliament, That all and every conveyance, grant, charge, lease, estate, incumbrance and limitation of use or uses, of, in, or out of any lands, tenements or other hereditaments whatsoever, had or made at any time heretofore sithence the beginning of the Queen's Majesty's reign that now is, or any time hereafter to be had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased, or shall afterwards purchase in fee simple, fee tail, for life, lives or years, the same lands, tenements and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbered, or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit or commodity in or out of the same, or any part thereof,—shall be deemed and taken only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators and assigns, and against all and every other person and persons lawfully having or claiming by, from or under them, or any of them which have purchased or shall thereafter so purchase, for money or other good consideration, the same lands, tenements, or hereditaments, or any part or parcel thereof, or any rent, profit or commodity, in or out of the same, to be utterly void, frustrate and of none effect; any pretence, color, feigned consideration, or expressing of any use or uses to the contrary notwithstanding.

8. That all and every the parties to such feigned, covinous and fraudulent gifts, grants, leases, charges or conveyances before expressed, or being privy and knowing of the same or any of them, which after the twentieth day of April next coming shall wittingly and willingly put in ure, avow, maintain, justify or amend the same or any of them, as true, simple and done had or made, *bond fide*, or upon good consideration, to the disturbance or hindrance of the said purchaser or purchasers, lessees or grantees, or of or to the disturbance or hindrance of their heirs, successors, executors, administrators or assigns, or such as have, or shall lawfully claim, anything by, from, or under them, or any of them, shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments so purchased or charged; the one moiety whereof to be to the Queen's Majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent gift, grant, lease, conveyance, incumbency, or limitation of use, to be recovered in any of the Queen's courts of record, by action of debt, bill, plaint or information, wherein no essoin, protection or wager of law shall be admitted for the defendant or defendants; and also, being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprize.

The penalty of the parties to fraudulent conveyances who do avow the same.

4. Provided also, and be it enacted, That this Act or anything herein contained, shall not extend or be construed to impeach, defeat, make void, or frustrate any conveyance, assignment of lease, assurance, grant, charge, lease, estate, interest, or limitation of use or uses, of in to or out of any lands, tenements, or hereditaments heretofore at any time had or made, or hereafter to be had or made, upon or for good consideration and *bond fide*, to any person or persons bodies politic or corporate; anything before-mentioned to the contrary hereof notwithstanding.

Act not to impeach conveyances made upon good considerations.

5. And be it further enacted, by the authority aforesaid, That if any person or persons have heretofore sithence the beginning of the Queen's Majesty's reign that now is, made or hereafter shall make any conveyance, gift, grant, demise, charge, limitation of use or uses or assurance of in or out of any lands, tenements or hereditaments, with any clause, provision, article or condition of revocation, determination or alteration at his or their will or pleasure, of such conveyance, assurance, grants, limitations of uses or estates of in or out of the said lands, tenements or hereditaments, or of in or out of any part or parcel of them, contained or mentioned in any writing, deed or indenture of such assurance, conveyance, grant or gift; and after such conveyance, grant, gift, demise, charge, limitation of uses or assurance, so made or had, shall or do bargain, sell, demise, grant, convey, or charge the same lands, tenements or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration paid or given (the said first conveyance, assurance, gift, grant, demise, charge or limitation, not by him or them revoked, made void, or altered, according to the power and authority reserved or expressed unto him or them, in and by the secret conveyance, assurance, gift or grant), that then the said former conveyance, assurance, gift, demise and grant, as touching the said lands, tenements, and hereditaments, so after bargained, sold, conveyed, demised or charged against the said bargainees, vendees, lessees, grantees and every of them, their heirs, successors, executors, administrators and assigns, and against all and every person and persons which have shall or may lawfully claim anything by, from or under them or any of them, shall be deemed taken and adjudged to be void, frustrate, and of none effect, by virtue and force of this present Act.

Lands first conveyed with condition of revocation or alteration, and after sold for money or other good consideration.

6. Provided nevertheless, That no lawful mortgage made or to be made *bond fide*, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of this Act, but shall stand in the like force and effect as the same should have done if this Act had never been had nor made; anything in this Act to the contrary notwithstanding.

Mortgages lawfully made

COURT OF CLAIMS.

5 W. IV. No. 21. An Act for appointing and empowering Commissioners to examine and report upon Claims to Grants of Lands under the Great Seal of the Colony of New South Wales. [2nd June, 1835.]

WHEREAS a certain Act was passed by His Excellency the Governor, with the advice of the Legislative Council of New South Wales, in the fourth year of the reign of His present Majesty, intituled, "*An Act for appointing and empowering Commissioners to hear and determine upon Claims to Grants of Lands under the Great Seal of the Colony of New South Wales*," (*) which Act is no longer in full operation, by reason of certain of the provisions thereof having been limited to a particular time. And the said Act having been found highly beneficial in settling disputed claims to grants of land, it is expedient

Preamble.

(*) For the distinction between this repealed Act and the repealing Act see the well-known case of *Cockcroft v. Hancy*, 9, S.C.B., App. 1.

Governor empowered to appoint Commissioners—their powers and duties.

to renew the same, with certain alterations and amendments: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice of the Legislative Council thereof, that it shall and may be lawful for the Governor of this Colony to issue one or more Commission or Commissions under the Great Seal of this Colony, as the same may become necessary, and thereby to nominate and appoint three or more persons to be "Commissioners for examining and reporting upon claims to Grants of Land within the Colony of New South Wales," and one of the said persons shall be appointed by the Governor to be President of the said Commission, and the said Commissioners or any two of them, of whom the President shall be one, shall have full power and authority to hear, examine, and report upon all applications for grants of land under the Great Seal of this Colony, that shall or may be referred to them under and by virtue of the provisions of this Act; and each of the said Commissioners shall, before proceeding to act as such, take and subscribe before one of the Judges of the Supreme Court the oath set forth in the Schedule hereunto annexed, marked A, and the Colonial Secretary shall cause the said oaths so subscribed to be recorded in his office.

Governor to appoint Secretary to Commissioners.

2. And be it further enacted, That some fit and proper person shall from time to time, as the same may become necessary, be appointed by the said Governor to perform the duties of Secretary to the said Commissioners; and the said Secretary shall, before exercising any of the duties of his office, take and subscribe before one of the Judges of the Supreme Court the oath set forth in the Schedule hereunto annexed, marked B and the Colonial Secretary shall cause the said oath so subscribed to be recorded in his office.

Governor as often as he shall see fit to refer all claims to grants of land to Commissioners.

3. And be it further enacted, That it shall be lawful for the Governor of the said Colony, as often as to His Excellency shall seem fit, to refer the claims of all persons to have grants of land in due form of law executed to them, in virtue and in performance of the promise of any Governor for the time being, to the said Commissioners, to the end that all such claims may be duly examined and reported upon for the information and guidance of the Governor: And the said Commissioners, or any two of them, of whom the President shall be one, shall proceed to hear, examine, and report thereon, in manner hereinafter mentioned: (*) Provided always, that nothing herein contained shall authorize the said Commissioners to receive or report upon any claims but such as shall be referred to them by the Governor as aforesaid.

Commissioners to be guided by the real justice and good conscience of the case.

4. And be it further enacted, That in hearing and examining all claims to grants as aforesaid, the said Commissioners shall be guided by the real justice and good conscience of the case, without regard to legal forms and solemnities, and shall direct themselves by the best evidence that they can procure, or that is laid before them, whether the same be such evidence as the law would require in other cases or not; and in case they or any two of them shall be satisfied that the person or persons claiming such lands, or any part thereof, is or are entitled in equity and good conscience to hold the said lands, and to have a grant thereof made and delivered to such person or persons under the Great Seal of the said Colony, they the said Commissioners, shall report the same, and the grounds thereof, to the Governor accordingly; and shall set forth the situation, measurement, and boundaries by which the said lands shall and may be described in every such grant: Provided however that nothing herein contained shall be held to oblige the Governor to make and deliver any such grant as aforesaid, unless His Excellency shall deem proper so to do.

Meetings of the Commissioners.

5. And be it further enacted, That the meetings of the said Commissioners shall be holden at such place as the said Governor shall from time to time appoint, and the said Commissioners shall proceed with all due despatch to investigate and report upon the claims referred.

Power of Commissioners to summon witnesses.

6. And be it further enacted, That it shall and may be lawful for the said Commissioners upon receiving any such claim for report as aforesaid, to appoint a day by notice in the *Government Gazette* for hearing such claim, and to issue summonses requiring all such persons as shall therein be named to appear before the said Commissioners at the day and time therein appointed, to give evidence as to all matters and things known to any such person respecting any claim as aforesaid, and to produce in evidence all deeds, instruments, or writings in the possession or control of any such persons which they might by law be required and compelled to give evidence of, or to produce in evidence, in any cause respecting the like matters depending in the Supreme Court of this Colony, in so far as the evidence of such persons, and the production of such deeds, instruments, and writings, shall be necessary for the due investigation of any such claim as aforesaid, depending before the said Commissioners; and that all such evidence shall

(*) In all grants issued in accordance with the reports of the Commissioners, it would appear that the reservation originated by Governor Darling's Proclamation has been introduced. That proviso is in the following terms: "Provided also, that the lawful rights of all parties, other than the grantee hereof, in the land hereby granted shall enure and be harmless—anything herein to the contrary, notwithstanding." As to effect of this proviso, see case last cited.

be taken down in writing, in the presence of the witnesses respectively giving the same, and shall at the time be signed by them, or in case of their refusing, or being unable to sign, by the Secretary to the said Commissioners; and that all such evidence shall be given on oath, which oath it shall and may be lawful for the said Commissioners to administer to every person appearing before them to give evidence; and that any person taking a false oath in any case wherein an oath is required to be taken by this Act shall be deemed guilty of wilful and corrupt perjury, and being thereof duly convicted shall be liable to such pains and penalties as by any laws now in force any person convicted of wilful and corrupt perjury is subject and liable to.

7. And be it further enacted, That whenever any person who being duly summoned to give evidence before the said Commissioners as aforesaid, his or her reasonable expenses having been paid or tendered, and not having any lawful impediment allowed by the said Commissioners, shall fail to appear at the time and place specified in such summons, or after appearing shall refuse to be sworn or to answer any lawful question, or to produce any deed, instrument, or writing which he or she may lawfully be required to produce, or without leave obtained from the said Commissioners shall wilfully withdraw from further examination, then and in every such case the said Commissioners shall cause such default, or refusal, or wilful withdrawing, to be certified in writing; and thereupon it shall and may be lawful for the person at whose instance, or on whose behalf such summons as aforesaid was issued, to take out the process of the Supreme Court for summoning such last-mentioned person to appear before the said Court at the time therein specified, summarily to show cause why he or she should not be attached, fined, or imprisoned, for such default, refusal, or wilful withdrawing as aforesaid; and if such person, having such last-mentioned summons duly served upon him or her, shall at the time therein specified, fail to show cause for his or her said default, refusal, or withdrawing, to the satisfaction of such Court, it shall and may be lawful for such Court, on proof, by the return of the officers serving the same, or by affidavit of the due service of the said summons to give evidence, and of the said summons to show cause, and on production of a copy of the said certificate under the hand of the Secretary of the said Commissioners, to grant a warrant to apprehend the person so failing to show cause, and to commit him or her to prison, and there to remain without bail, until he or she shall submit to be sworn, and to answer all such questions, and to produce all such deeds, instruments, or writings as aforesaid, in so far as shall lawfully be required of him or her, and further to set such fine upon such person as the Court shall think meet; and unless the same shall be forthwith paid, to grant process for levying the amount thereof upon the property of such person; and every such fine, or the amount thereof which shall be levied, shall forthwith be paid to the Chief Clerk of the said Court, and the said Chief Clerk shall forthwith, out of the amount of such fine, pay to the person at whose instance the sentence imposing the fine was obtained, the expenses incurred in summoning the person fined, and in obtaining such sentence, as taxed by the said Chief Clerk, and shall account for and pay over the residue of such fine, in like manner as he is by law required and directed to account for and pay over fees or fines received by him as Chief Clerk of such Court.

Witnesses not appearing, or refusing to give evidence.

8. And be it further enacted, That all mortgages and judgments which would have bound the said lands, or any part of them, in case grants thereof had been given under the Great Seal of the Colony before such mortgages or judgments were made or given, shall have the same force and effect with respect to such lands, after grants thereof shall have been made and delivered in pursuance of the provisions of this Act, as if the same had been made and delivered previous to the dates of such mortgages or judgments as aforesaid, any law to the contrary in anywise notwithstanding.

Effect of mortgages and judgments prior to actual grant.

9. And be it further enacted, That the said Commissioners shall and may receive for their own use, for every final report made by them in manner and form aforesaid, upon any claim or claims to a grant of land, the sum of three guineas; and that the Secretary to the said Commissioners shall and may receive for his services for every case referred to such Commissioners the sum of one pound; which said sums, respectively, it shall and may be lawful for His Excellency the Governor to order and direct by warrant under his hand to be paid from and out of the Public Treasury of the said Colony, and the same shall be the whole of the remuneration of the said Commissioners and Secretary, and every of them respectively, for and in respect of their said offices.*

The sum of three guineas to be paid for each report.

10. And be it further enacted, That there shall be paid to the Secretary of the said Commissioners by every person making a claim to a grant of land which shall be referred by the Governor to the said Commissioners for examination as hereinbefore is provided, the several fees specified in the Schedule hereunto annexed, marked C, and the said Secretary shall duly account for the fees so paid to him as aforesaid, and shall pay the same into the hands of the Colonial Treasurer on the last day of every month, to be appropriated to the public uses of the said Colony and in support of the Government thereof: Provided always, and be it further enacted, That it shall and may be lawful

Fees to be taken by Secretary to Commissioners

* Section 9 repealed by 18 Vic. No. 11, which substitutes other fees.

COURT OF CLAIMS.

for the said Commissioners, or any two of them, of whom the President shall be one, to admit any poor person to appear and prosecute his claim as aforesaid without the payment of any fees, if it shall appear to the said Commissioners that such person is poor and not in a condition to pay the same.

Repeal of 4 Gul.
IV No. 9,
except as to
matters and
things actually
commenced.

11. And be it further enacted, That from and after the passing of this Act, the said recited Act of the Governor and Council, passed in the fourth year of the reign of his present Majesty, shall be and the same is hereby repealed, saving and excepting as to all matters and things actually commenced, and still pending and undetermined, all which said matters and things shall and may be done, performed, determined, and completed under the said recited Act in like manner as if the same had continued in full force and operation.

SCHEDULE C.

FEES to be received by the Secretary to the Commissioners.

	£	s.	d.
For every summons for witnesses, each summons containing four names, by the party requiring the same	0	2	6
For every witness examined, or document or voucher produced in evidence, by the party on whose behalf examined or produced	0	1	0
For taking down the examination of any witness	0	1	0
For every one hundred words after the first hundred additional	0	1	0
For every certificate granted by Commissioners, of default, refusal to answer, or wilful withdrawing of any witness	1	0	0
For every final report, to be paid by the party or parties in whose favour report made ^(*)	2	0	0

CREDITORS' REMEDIES.

(See *Equity Practice*.)

DEBTS (PAYMENT OF OUT OF REALTY).

54 Geo. III c. 15. An Act for the more easy recovery of Debts in His Majesty's Colony of New South Wales. [6th December, 1813.]

Lands &c. in
plantation liable
to satisfy debts.

4. And be it further enacted, That, from and after the said 25th day of June, 1814, the houses, lands, and other hereditaments and real estates, situate or being within the said Colony of New South Wales or its dependencies, belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands of what nature or kind soever, owing by any such person to His Majesty or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other speciality, and shall be subject to the like remedies, proceeding, and process, in any court of law or equity in the said Colony of New South Wales or its dependencies, for seizing, extending, selling or disposing of any such houses, lands and other hereditaments and real estates, towards the satisfaction of such debts, duties, and demands, and in like manner as personal estates in the said Colony are seized, extended, sold, or disposed of, for the satisfaction of debts. ⁽¹⁰⁾

^(*) Fees increased by 6 Vic. No. 11 and 18 Vic. No. 11.

⁽¹⁰⁾ In 1849 W. died having duly executed a will whereby he devised, subject to the payment of his debts, all his realty to his four children, directing that "these four children, together with their mother, will possess the 30-acre farm for their own absolute use. My wife shall live on the farm as long as she is alive, and she can never let, sell, or mortgage the property; my children can equally divide it among themselves after the death of their mother, and when the youngest is twenty years of age or married;" and he appointed S. and his widow his executors. The will was never proved, but shortly after his death (in 1850), his executors sold, for the purpose of paying his debts, 10 acres out of the 30, which 10 acres, after being several times sold to successive purchasers with the consent of the executors, were at last, with the like consent, purchased by R. No conveyance was executed to R. of the 30 acres, or to any of the successive purchasers of the 10 acres, but they had all remained in quiet possession from the time of their several purchases. The eldest son on coming of age brought an action of ejectment against R., who thereupon filed his bill, praying an injunction to stay the action, and for a conveyance of the 30 acres and 10 acres to him. *Held*, that R. was entitled to a legal conveyance, both of the 30 acres and the 10 acres. *Held* also, that the sale by the executors, though acting as executors *de son tort* of the 10 acres, was a good and effectual sale by them under the circumstances. *Held* also, following

11 G. IV & 1 W. IV c. 47. (*) . An Act for consolidating and amending the Laws for facilitating the Payment of Debts out of Real Estate. [16th July, 1830.]

WHEREAS an Act was passed in the third and fourth years of King William and Queen 3 & 4 W. and M. Mary, intituled, "*An Act for the relief of Creditors against fraudulent Devises*," which c. 14. was made perpetual by an Act passed in the sixth and seventh years of King William 6 & 7 W. III c. 14. the Third, intituled, "*An Act for continuing several Laws therein mentioned*," and whereas an Act was passed by the Parliament of Ireland in the fourth year of Queen Anne, 4 Anne c. 5 (1). intituled, "*An Act for relief of Creditors against fraudulent Devises*," and whereas an Act was passed in the forty-seventh year of His late Majesty King George the Third, 47 G. III c. 74. intituled, "*An Act for more effectually securing the Payment of Debts of Traders*:" and whereas it is expedient that the provisions of the said recited Acts should be enlarged, and that the said recited Acts should be repealed in order that all the provisions relating to this matter should be consolidated in one Act: Be it therefore enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the said several recited Acts shall be and the same are hereby repealed, Recited Acts re- but so as not to affect any of the provisions and remedies of the said Acts, or any of them, pealed. to the benefit of which any persons are entitled, as against any estate or interest in any lands, tenements, hereditaments, or other real estate, of any person or persons who died before the passing of this Act.

2. And whereas it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened that where several persons having by bonds, covenants, or other specialties bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, and for the maintenance of just and upright dealing, be it therefore further enacted, That all wills and testamentary limitations, dispositions, or appointments, already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them, with whom the person or persons making any such wills or testaments, limitations, dispositions, or appointments shall have entered into any bond, covenant, or other specialty binding his, her, or their heirs) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; any pretence, color, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding.

3. And, for the means that such creditors may be enabled to recover upon such bonds, covenants, and other specialties, be it further enacted, That in the cases before mentioned Enabling credit- ors to recover upon bonds, &c.

Bullen and A'Beckett (see *infra*), that though the Imperial Act for the more easy recovery of debts in New South Wales, 54 G. III. c. 15, renders real estates in this Colony liable for debts of every kind, the creditor must proceed in respect to the real estate as he would in respect of the personal estate, but in both instances against the person in whom the property is vested. *Held*, that as in this case the person entitled to the real estate was made defendant, he was bound to effectuate the sale of the 10 acres by the executors. The Court never sets aside *bond fide* sales or contracts which would be admitted to be valid if made under decree, merely because such sanction has not been obtained to a just administration. See *Rose v. Woodland and others*.—6, S.C.R., Eq., p. 60. As to obligation of real estate to pay debts of testator under 54 G. III. c. 15, see *M'Lean v. Dight*, 5, S.C.R., p. 95; and *Bullen v. A'Beckett*, 1 Moore's P.C.C., N.S., 223, in which case it was held that the object of the Statute was to render real estates in New South Wales liable for simple contract debts, as land is liable in England for bond and specialty debts; but that a creditor is bound to proceed in respect of the real estate against the person in whom the property is vested. *Stephen, C.J.*, delivering the judgment of the Court in *Maclean v. Dight*, 5, S.C.R., p. 95., said that, "Every devise is by the combined effect of the several statutes (sc. 3 and 4 Wm. and M. c. 14, 54 Geo. III. c. 15, and 1 Wm. IV. c. 47) void against the testator's unpaid creditors of every degree, and therefore the land remains (or becomes) vested in the heir for their benefit."

(*) Adopted by 5 W. IV No. 8.

DEBTS (PAYMENT OF OUT OF REALTY).

every such creditor shall and may have and maintain his, her, and their action and actions of debt or covenant upon the said bonds, covenants, and specialties against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, or the devisee or devisees of such first-mentioned devisee or devisees jointly, by virtue of this Act; and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended.

If there is no heir at law actions may be maintained against the devisee.

4. And be it further enacted, That if in any case there shall not be any heir at law against whom jointly with the devisee or devisees a remedy is hereby given, in every such case every creditor to whom by this Act relief is so given shall and may have and maintain his, her, and their action and actions of debt or covenant, and as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid.

Not to affect limitations for just debts or portions for children.

5. Provided always and be it further enacted, That where there hath been or shall be any limitation or appointment, devise, or disposition, of or concerning any manors, messuages, lands, tenements, or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, according to or in pursuance of any marriage contract or agreement in writing *bond fide* made before such marriage, the same and every of them shall be in full force, and the same manors, messuages, lands, tenements, or hereditaments shall and may be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised, or disposed, until such debt or debts, portion or portions, shall be raised, paid, and satisfied, anything in this Act contained to the contrary notwithstanding.

Heir at law to be answerable for debts although he may sell estate before action brought.

6. And be it further enacted, That in all cases where any heir at law shall be liable to pay the debts or perform the covenants of his ancestors, in regard of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir at law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments, *bond fide* aliened before the action brought, shall not be liable to such execution.

Where an action of debt is brought against the heir he may plead riens per descent.

7. Provided always and be it further enacted, That where any action of debt or covenant upon any specialty is brought against the heir, he may plead riens per descent at the time of the original writ brought or the bill filed against him, anything herein contained to the contrary notwithstanding; and the plaintiff in such action may reply that he had lands, tenements, or hereditaments from his ancestor before the original writ brought or bill filed; and if upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or *nihil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands, tenements, or hereditaments so descended.

Devisees to be liable the same as heirs at law.

8. Provided always and be it further enacted, That all and every the devisee and devisees made liable by this Act, shall be liable and chargeable in the same manner as the heir at law by force of this Act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought.

Traders' estates shall be assets to be administered in Courts of Equity.

9. And be it further enacted, That from and after the passing of this Act, where any person being, at the time of his death, a trader, within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, or other real estate, which he shall not by his last will have charged with or devised subject to or for the payment of his debts, and which would be assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in Courts of Equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, devisee or devisees of such debtor, and the devisee or devisees of such first-mentioned devisee or devisees, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors by specialty in which the heirs were bound: Provided always, that in the administration of assets by Courts of Equity, under and by virtue of this provision, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to

Creditors by specialty to be paid first.

them, before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands.

10. And be it further enacted, That from and after the passing of this Act, where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur, but such action, suit, or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of this Act be carried on or prosecuted by or against any infant, where, according to law, the parol did not demur.

Parol shall not demur by or against infants.

11. And be it further enacted, That where any suit hath been or shall be instituted in any Court of Equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such Court of Equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such Court shall direct, and if necessary compel, such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said Court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years.

Infants to make conveyances under order of the Court.

12. And be it further enacted, That where any lands, tenements, or hereditaments hath been or shall be devised in settlement by any person or persons whose estate under this Act, or by law, or by his or their will or wills, shall be liable to the payment of any of his or their debts, and by such devise shall be vested in any person or persons for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person or persons from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise, and a decree shall be made for the sale thereof for the payment of such debts or any of them, it shall be lawful for the Court by whom such decree shall be made to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey, release, assign, surrender, or otherwise assure the fee simple or other the whole interest or interests so to be sold to the purchaser or purchasers, or in such manner as the said Court shall think proper; and every such conveyance, release, surrender, assignment, or other assurance shall be as effectual as if the person who shall make and execute the same were seised or possessed of the fee simple or other whole estate so to be sold.

Persons having a life interest may convey the fee if the estate is ordered to be sold.

13. And be it further enacted, That nothing in this Act shall extend, or be deemed or construed to extend, to repeal or alter an Act made by the Parliament of Ireland in the thirty-third year of the reign of King George the First, intituled, "*An Act for the better securing the payment of Bankers' Notes and for providing a more effectual remedy for the security and payment of the Debts due by Bankers.*"

Not to repeal Act 33 Geo. I (1.) relating to debts due to bankers.

21 Vic. No. 6. An Act for further facilitating the payment of Debts out of Real Estate. [31st May, 1858.]

WHEREAS it is expedient to extend the provisions contained in the eleventh and twelfth sections of the Imperial Act 11 Geo. IV and 1 Wm. IV c. 47 adopted and applied to this Colony by the Act of Council 5 Wm. IV No. 8 in like manner as the same have been extended in England by the Imperial Acts 2 and 3 Vic. c. 60 and 11 and 12 Vic. c. 87,—Be it therefore, &c., &c. :—

Preamble.

1. The said sections shall extend and the same are hereby extended to authorize Courts of Equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees as are referred to in the said eleventh section of the said Act, and also of lands, tenements, or hereditaments devised in settlement as mentioned in the said twelfth section, and to authorize such sales and mortgages to be made, in cases where the tenant for life, or other person having a limited interest, or the first executory devisee, as referred to in the said Act, is an infant.

Courts of Equity authorized to direct mortgages as well as sales.

2. When any such sale or mortgage shall be made, the surplus (if any) of the money raised by such sale or mortgage which shall remain after answering the purposes for which the same shall have been raised, and defraying all legal costs and expenses, shall be considered in all respects of the same nature, and descend or devolve in the same manner, as the estate or the lands, tenements, or hereditaments so sold or mortgaged, and shall belong to the same persons, be subject to the same limitations and provisions, and be applicable to the same purposes as such estate, or such lands, tenements, or hereditaments would have belonged and been subject and applicable to, in case no such sale or mortgage had been made.

Surplus of money raised by sale or mortgage after defraying expenses to descend or devolve as the estate.

DEBTS (PAYMENT OF OUT OF REALTY).

Provisions extended to lands, &c., of deceased debtor in certain cases.

3. In cases in other respects falling within the said hereinbefore recited provisions of the said Act, the said twelfth section thereof shall extend, and is hereby extended to any case in which any lands, tenements, or hereditaments of any deceased person shall by descent, or otherwise than by devise, be vested in the heir or co-heirs of such person, subject to an executory devise over in favour of a person or persons not existing or not ascertained: And in any such case it shall be lawful for the Court by whom any decree shall be made as mentioned in the said Act, to direct such heir or co-heirs, although an infant or infants, to convey, release, assign, surrender, or otherwise assure the fee simple or other the whole interest to be sold to the purchaser or purchasers, or as such Court shall think proper: And every such conveyance, release, assignment, surrender, or other assurance shall be as effectual as if the heir or co-heirs making and executing the same, was or were seised or possessed of the fee simple or other whole interest and estate so to be sold, and, if an infant or infants, was or were of full age.

DECEASED PERSONS' ESTATES.

11 Vic. No. 24. An Act for the better preservation and management of the Estates of Deceased Persons in certain cases. [1st October, 1847.]

Preamble.
9 Geo. IV c. 83,
sec. 12.

WHEREAS by an Act of Parliament, passed in the ninth year of the reign of His late Majesty King George the Fourth, intituled, "*An Act to provide for the Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof, and for other purposes relating thereto*," it was amongst other things enacted, "that in all cases where the executor or executors of any will, upon being duly cited, shall refuse or neglect to take out probate, or where the next of kin shall be absent, and the effects of the deceased shall appear to the Supreme Court to be exposed and liable to waste, it shall be lawful for the said Court to authorize and empower the Registrar, or other ministerial officer of the said Court, to collect such effects, and hold or deposit or invest the same, in such manner and place, or upon such security, and subject to such orders and directions as shall be made, either as applicable in all such cases, or specially in any case, by the said Court in respect of the custody, control, or disposal thereof;" And whereas by an Act of the Governor and Council of New South Wales, passed in the first year of the reign of Her present Majesty, intituled, "*An Act for the investment of moneys belonging to Intestate Estates, by the Supreme Court in the New South Wales Savings Bank at Sydney*," provision is made for the investment of moneys belonging to estates of persons dying intestate, under the control of the Supreme Court of New South Wales, in the said Bank, and for the withdrawal thereof: And whereas it is expedient to extend the power of collecting, managing, and administering the estates of deceased persons, in cases where there shall not be any person empowered to collect, administer, or manage the same, and otherwise to regulate the powers and duties of the Judges of the said Supreme Court and of the officer appointed to collect the said estates: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, That any officer appointed or to be appointed hereafter by the said Supreme Court to collect the estates of deceased persons, under the provisions of the said Act of Parliament, shall, in respect of his said office, be styled "Curator of Intestate Estates," and shall perform the duties, and have the powers and rights, and be subject to the liabilities hereinafter expressed, declared, and contained; and such officer shall from time to time procure and give security by bond or recognizance to Her Majesty the Queen and her Successors, in the sum of two thousand pounds, by himself and such sureties as Her said Majesty or Her Successors may think fit, conditioned for the collection and due payment of and accounting for all moneys which shall come to his hands by virtue of his office of Curator of Intestate Estates: Provided always, that no surety for such officer shall be liable beyond the separate amount in which he may have bound himself, and also that every such surety may withdraw from any further liability for the future under any such bond or recognizance, by giving to Her Majesty's Attorney General for New South Wales three months' notice in writing of his intended withdrawal, without prejudice nevertheless to his liability for any previous breach of the condition of such bond or recognizance.

Vic. No. 4.

Curator of Intestate Estates
to give security.

Liability of
sureties.

Order to collect
and effect
thereof.

2. And be it enacted, That the Curator of Intestate Estates shall, from time to time, so soon as conveniently may be after receiving information, on oath, of the death of any person leaving any personal estate liable to be collected by him, apply to the said Court, or one of the Judges thereof, for an order authorizing him to collect, manage, and administer such estate; and the said Court or Judge shall, if satisfied that the case is within the provisions of the said Act of Parliament, or of this Act, make such order; which order, when made, shall give to the Curator of Intestate Estates the same power over the personal estate of the deceased person, except as hereby enacted, as he would have had if letters of administration of such personal estate had been granted to the said officer, subject nevertheless to any order or orders which may from time to time be made by the said Court, or one of the Judges thereof, on petition as hereinafter mentioned, touching

the said estate, or the collection, management, or administration thereof : Provided nevertheless that an order to collect, manage, and administer any estate shall not, either before or after the same shall be made, prevent the proving of any will, or the obtaining of any letters of administration to the personal estate of any person dying intestate, or limit or affect the powers or duties of any executor or administrator of the same estate.

Order to collect, &c., not to prevent the subsequent proving of a will, &c.

3. And be it enacted, That after an order to collect, manage, and administer the estates of deceased persons shall have been made, all disputes and matters touching the collection, management, or administration of the same, within the provisions of the said Act of Parliament or of this Act, and all claims and demands thereon, except as hereinafter provided, shall be decided by the said Supreme Court or one of the Judges thereof, on petition, in like manner as if the matter were in the equitable jurisdiction of the said Court ; and the Judges of the said Court shall from time to time make such general rules and orders touching such petitions, and the proceedings thereon, as to them shall seem expedient ; and all petitions and orders presented and made under the provisions of the said Act of Parliament or of this Act, and all affidavits used in support of or in opposition to such petitions, or otherwise relating to the estates of such deceased persons as aforesaid, and all accounts of the collection of intestates' estates, passed or to be passed, shall be filed in such office of the Supreme Court as the said Judges shall from time to time direct : Provided nevertheless, that if the said Supreme Court, or the Judge to whom any petition shall be presented touching the matters aforesaid, shall think it desirable that the matter in question should not be decided on petition, the said Court or Judge shall order such proceedings to be instituted at law or in equity as shall be considered proper for the decision thereof.

Mode of proceeding under this Act.

4. And be it enacted, That all orders which shall be made by the said Court, or a Judge thereof, shall be enforced by the same process as the like orders would be enforced by, if they were made by the said Supreme Court in its equitable jurisdiction ; and that all affidavits made in respect of the collection, management, or administration of the estates of deceased persons, under the provisions of the said Act of Parliament or of this Act, or relating thereto, or to any proceedings at law or in equity, under the provisions of this Act, or relating thereto, may be sworn before a Commissioner of the Supreme Court for taking Affidavits, or (in places beyond the County of Cumberland) before any Justice of the Peace, who is hereby empowered to administer the same, anything in an Act passed in the ninth year of Her Majesty's reign, intituled, "*An Act for the more effectual abolition of Oaths and Affirmations taken and made in various Departments of the Government of New South Wales, and to substitute Declarations in lieu thereof, and for the suppression of voluntary and extra-judicial Oaths and Affidavits,*" to the contrary notwithstanding.

Enforcing orders.

9 Vic. No. 2.

5. And be it enacted, That the Curator of Intestate Estates shall apply for an order to collect, manage, and administer the estate of any deceased person, and the said Court or Judge thereof shall have authority to make such order, whenever such person shall have died beyond the jurisdiction of the said Court, but leaving personal property within the jurisdiction thereof, which would be held to be within the provisions of the said Act of Parliament, or of this Act, if such person had died within the jurisdiction of the said Court.

Persons dying beyond the jurisdiction of the Court.

6. And be it enacted, That when any person shall have died, having made a will, and named executors or an executor thereof, bequeathing personal property within the jurisdiction of the said Court, and probate thereof or letters of administration with the will annexed, shall not have been obtained within six calendar months after the death of the testator, the Curator of Intestate Estates, upon information on oath being given to him of the said facts, shall cite the executors named in the said will to come in and prove the same, or show cause within fourteen days after such citation why an order should not be made for the said officer to collect, manage, and administer the said estate ; and such citation shall be by notice under the hand of the Curator of Intestate Estates, which notice shall (with respect to such of the said executors as shall have a place of residence within this Colony known to the said Curator), be served personally, or by delivery at such residence ; and (with respect to such of them as may be out of the Colony, or have no known place of residence within it) shall be twice inserted in the *Government Gazette* ; and if at the expiration of the said fourteen days, the said will shall not be proved, or cause shown to the satisfaction of the said Court or a Judge thereof why the order should not be made, such order shall upon the petition of the said officer be made accordingly. (*)

Cases where no Probate within six months.

7. And be it enacted, That when any person shall have died intestate (or if he shall have made a will, without naming any executor thereof), leaving personal property within the jurisdiction of the said Supreme Court, and letters of administration shall not have been obtained within three calendar months after the death of such deceased person, the Curator of Intestate Estates, upon information on oath being given to him of the said facts, shall cite in manner aforesaid the widow and next of kin who may be entitled to administer, to apply for and obtain letters of administration, or show cause within one calendar month after such citation why an order should not be made for the said officer to collect, manage, and administer the said estate ; and if at the expiration of the said one

The like where no executor named or no will made.

(*) See 15 Vic. No. 8, *post*.

DECEASED PERSONS' ESTATES.

calendar month, letters of administration shall not have been obtained, or cause shown to the Court, or a Judge thereof, why such order should not be made, such order, upon the petition of the said officer, shall be made.

Suits by or
against Curator.

8. And be it enacted, That in all proceedings under the said Act of Parliament or under this Act, and in all proceedings at law or in equity, the said officer shall sue and be sued by his name, with the addition of the words "Curator of Intestate Estates," and it shall not be necessary for him, or the person or persons suing him, to state or prove his general authority to collect, manage, and administer the estates of the deceased persons leaving property within the provisions of the said Act of Parliament, or of this Act, but merely the order made on the petition of the said Curator for such purposes, in the specific estate to which the proceeding may relate; and whenever the office of "Curator of Intestate Estates" shall become vacant, by the death or removal of the officer appointed for the time being to collect, manage, and administer the estates of deceased persons, and another officer shall be appointed to that office during the pendency of any petition, action, suit, or other proceeding such petition, action, suit, or proceeding shall not abate or become defective, but the petition, action, suit, or other proceeding shall be continued by or against the officer newly appointed, and his name be used in all future proceedings in lieu of the name of the officer so deceased or removed.

Accounts to be
kept &c.

9. And be it enacted, That the Curator of Intestate Estates shall make, or cause to be made, an inventory or list of all the personal estate of the persons whose estates he shall have been ordered to collect, manage, and administer, and shall retain the same in his office, and shall keep an account of all his receipts, payments, and dealings in every such estate, and shall retain all letters received, and copies of all letters written by him, and all deeds, papers, and writings of and relating to such estates, and shall permit all persons to inspect and take copies of the same, and of all proceedings relating thereto, at all reasonable hours, or shall furnish office copies thereof on payment of the fees mentioned in the schedule hereto annexed, and shall convert into money all such personal estate as shall not consist of money, unless order be made to the contrary by the said Court or a Judge thereof.

Payment of
debts.

10. And be it enacted, That the Curator of Intestate Estates shall, at such times as he shall think fit, cause advertisements to be inserted in the *New South Wales Government Gazette*, and such other public papers as he shall deem expedient, calling upon the creditors of the persons whose estates he shall have been ordered to collect, manage, and administer, to come in and prove their debts before him; and the said Curator of Intestate Estates shall allow any claim which may be made before him, if the same shall amount to the sum of twenty pounds or upwards, upon the like proof as would be required by the Master in Equity for proof of a claim made before him, upon a reference to take an account of debts in a suit instituted by a creditor on behalf of himself and others, against an executor or administrator; and shall allow any claim not amounting to the sum of twenty pounds, upon the affidavit of the claimant alone, or where he shall think fit to call for further evidence upon such further evidence as he shall require, and the said Curator of Intestate Estates shall, as soon after the expiration of the time allowed for proof of debts as he conveniently can, pay the debts proved, if the whole thereof can be paid, and if not shall declare and pay a dividend thereon; and if he shall collect any further assets after making such payment, he shall, in case any part of the debts proved remain unpaid, pay the same, and any debts subsequently proved before him (or a dividend thereon, as the case may be), but such debts as shall be subsequently proved shall first be paid a dividend, in proportion to their amount, equal to the dividend paid to creditors having previously proved their debts; and after payment of all debts, fees, and expenses incident to the collection, management, and administration of such personal estate, shall pay over the residue to the personal representative of the intestate or testator (as the case may be) so soon as such representative shall have been duly constituted.

Investments in
Savings Bank.

11. Provided always, and be it enacted, That nothing in this Act contained shall be construed to repeal or affect (except as herein expressly enacted) the provisions of the said recited Act of Council, or any general rule or rules made or to be made by the Judges of the said Court, with respect to the investment of money belonging to the estates of intestate persons in the New South Wales Savings Bank: save and except that any order for the withdrawing of any such money may be made by the said Court or one of the Judges thereof.

Payment to rela-
tives, &c., in
petty cases.

12. And be it enacted, That after the expiration of twelve calendar months from the time fixed by the advertisement for creditors to come in and prove their debts, if no debt shall be proved, or no creditor having proved his debt shall remain unpaid, it shall be lawful for any Judge of the Supreme Court, if he shall think fit so to do, to order the Curator of Intestate Estates to pay any sum, not exceeding fifty pounds, to any person claiming to be a party in distribution, or to be a legatee under a will, without letters of administration having been obtained, or the will being proved, and without legal proof of the right or title of the party so claiming; and the said Curator of Intestate Estates shall pay the money so ordered to be paid, or, if necessary, shall remit the same in such manner as he shall think most safe and convenient.

DECEASED PERSONS' ESTATES.

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13. And be it enacted, That the Curator of Intestate Estates shall, once in every quarter of a year, on a day to be fixed by a Judge of the Supreme Court, or oftener if required by the said Court, pass his accounts in each estate before one of the Judges of the said Court; but the passing of such accounts shall not prevent his being thereafter liable to any claim which may be at any time made on him in respect of any sum received and not accounted for, or any sum which might have been received by him but for his wilful neglect or default; and the Curator of Intestate Estates shall, in every year, in the month of January, transmit to Her Majesty's Principal Secretary of State for the Colonies, a return of all moneys paid, received, and invested in the Savings' Bank, in respect of all the estates of deceased persons entrusted to him for collection during the preceding year, distinguishing the particular estate in which the same have been so received, paid, or invested; and he shall also publish twice in every year, in the months of January and July, a like return in the *New South Wales Government Gazette*, in respect of the six months preceding.

Passing Curators accounts and advertising same, &c.

14. And be it enacted, That the Curator of Intestate Estates shall have the same power to require a release and discharge upon the winding up any estate in his charge, and handing over the property which may be in his hands to the person or persons entitled thereto, as any executor, administrator, or any other trustee now has in the like circumstances.

Discharge to Curator on winding up estate.

15. And be it enacted, That the clerks to the several Benches of Magistrates within the Colony of New South Wales, shall, at the request of the Curator of Intestate Estates, act as his agents in the collecting and getting in of all property within their districts respectively, belonging to deceased persons whose estates shall have been duly ordered to be collected; and where any such property shall be situate in any part of the Colony to which there shall have been no such clerk appointed, the Curator of Intestate Estates shall appoint as his agent, to collect and get in the property of the deceased, such person as he shall think fit; and such clerks and agents shall collect all such property, and convert the same (if so directed) into money, and remit the proceeds, or pay debts due by the deceased person out of the same, and otherwise act in the premises, under the direction of the Curator of Intestate Estates, who shall not be answerable for any act or omission of any such clerk or agent, not in conformity with any such direction, or which shall not have happened by the said Curator's own default or neglect.

Agents to Curator.

16. And be it enacted, That the Curator of Intestate Estates shall take, retain, and receive the fees set out in the Schedule hereunto annexed, and also a commission at the rate of five pounds per centum, on all sums of money which shall be collected by him, whether personally, or by any clerk or agent as aforesaid, and pay the same into the Colonial Treasury: Provided that in respect of all sums of money which shall be collected or come to the hands of any clerk to a Bench of Magistrates, or other agent employed by the said Curator, he shall make an allowance at the rate of three pounds per centum to such clerk or agent out of such commission, as a remuneration for his services. (*)

Fees to be taken and appropriation thereof.

SCHEDULE REFERRED TO.

	£	s.	d.
For every order to collect where effects shall appear to be above £50	0	7	6
Where effects shall appear to be £50 or under	0	5	0
For every order to pay money if £10 and under £20	0	2	6
If £20 and under £50	0	5	0
If £50 and under £100	0	10	0
And on every £100 above the first	0	2	6
For every common order	0	2	6
For every special order	0	5	0
For every office copy 3d. per folio			
On every audit of accounts including the direction to invest assets, if the amount which shall have been in the Curator's hands be under £20	0	5	0
If £20 and under £50	0	7	6
If £50 and under £100	0	10	0
For every £100 above the first	0	2	6

15 Vic. No. 8. An Act to amend, in certain particulars, the Act passed for the better preservation of the Estates of deceased persons. [9th December, 1851.]

WHEREAS under the Act of His Excellency the Governor of New South Wales and the Legislative Council thereof, passed in the eleventh year of the reign of Her present Majesty, intituled, "*An Act for the better preservation and management of the Estates of deceased persons in certain cases*," an order for the Curator of Intestate Estates to

Recital.

11 Vic. No. 24, ss. 6 and 7.

(*) The remaining five sections of this Act have been omitted, as not being of any general utility.

DECEASED PERSONS' ESTATES.

collect the personal estate of a deceased person cannot be applied for, in certain cases, until after the expiration of three months from the time of the death of the party, or in certain other cases until after the expiration of six months from such death : And whereas it is expedient that in the cases hereinafter mentioned provision should be made for the granting of orders to collect before the expiration of those periods, and for the granting of such orders when executors or the persons primarily entitled to letters of administration shall renounce probate, or shall be unwilling or unable from any cause to take out letters of administration : Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, that the Curator of Intestate Estates shall apply for, and may at any time after the death of any deceased person, and without previous citation, obtain an order to collect, manage, and administer the estate of such person, in any of the cases mentioned respectively in the sixth and seventh sections of the said recited Act, where the Supreme Court of New South Wales, or the Judge applied to for such order, shall be satisfied by affidavit that the effects of the deceased will otherwise be probably purloined, lost, or destroyed, or that great expense will be incurred by delay in the matter.

Cases where the goods will probably be purloined or destroyed.

Cases where no probate or letters will probably be obtained.

2. And be it enacted, That the like order shall or may be applied for and may be obtained in any of the said cases (after due citation, as mentioned in the said sections respectively, and after the expiration of thirty days after the death of the deceased person), where the said Court or the Judge applied to shall be satisfied by affidavit that there is no reasonable probability of probate or letters of administration being obtained within the aforesaid period of six months or three months (as the case may be) after the death of such deceased person.

Cases of renunciation.

3. And be it enacted, That whenever the Curator of Intestate Estates shall have received information on oath that any person has died either having made a will or intestate, and that the several persons named as executors have renounced probate of such will, or that all the persons primarily entitled to letters of administration have, by a memorandum or declaration in writing filed in the Office of the Registrar of the Supreme Court, declined to take out such letters, the said Curator shall apply for an order to collect, manage, and administer the estate of such deceased person ; and the Supreme Court of New South Wales, or any Judge thereof, shall or may thereupon, without citation, and at any time after the death of the deceased person, if satisfied of those facts, make such order accordingly.

Curator to act as the Court or a Judge shall direct.

4. And be it enacted, That in all cases where an order to collect shall have been or shall be made under the said recited Act, or under this Act, or under the Statute passed in the ninth year of the reign of King George the Fourth in that behalf, it shall be lawful for the Court, or any Judge thereof, on the petition of the Curator or any person interested in the estate, to make such order or orders from time to time touching the collection, sale, investment, and disposal of the estate, as to such Court or Judge shall seem meet.

Curator may with consent of a Judge depute an official assignee in insolvency as collector, &c.

5. And be it enacted, That it shall be lawful for the Curator at any time or times hereafter, with the consent in writing of one of the Judges, to depute the actual collection of any estate or estates, and the goods, debts, and moneys therein, to one of the Official Assignees in Insolvency ; and thereafter every assignee so deputed in respect of every estate committed to him under this section, shall be deemed an agent of the Curator within the meaning of the aforesaid recited Act, and shall be bound to account from time to time to him, as and when such Curator (or as the Supreme Court, or any Judge thereof) shall from time to time require, and shall pay over all balances in his hands to the Curator monthly or oftener if so required, and shall be entitled to retain to his own use, out of the property realized and moneys collected by him, a commission of not less than three, nor more than five per cent., as one of the Judges may in each case appoint as a remuneration for his services therein.

Curator or his agents not liable for acts done in the performance of their duties.

6. And be it enacted, That neither the Curator of Intestate Estates, nor any of his agents, shall be personally liable to any person in respect of goods or chattels in the possession of any intestate at the time of his death, which shall be sold by the Curator or any such Agent, as the goods of such intestate, unless such Curator or Agent shall know, or have actual notice before the sale, that such goods or chattels were not in fact the property of such intestate ; and generally neither the Curator nor any of his Agents shall be liable for any act done by him or them *bona fide* in the supposed and intended performance of their duties respectively, unless it shall be shown that such act was done not only illegally but wilfully or with gross negligence : Provided always, that in case of any sale by the Curator or his agents, of goods or chattels belonging in fact to any third person, the amount realized by such sale thereof shall be paid over by him or them to the owner upon proof by him of such ownership, unless the same shall have been applied in the payment of the debts of the deceased, or shall have been distributed according to any will of the deceased, or in the ordinary course of administration, whilst the said Curator or any such agent was in ignorance and without actual notice of the claim of such person to the goods or chattels so sold.

DESERTED WIVES AND CHILDREN.

25

19 Vic. No. 1. An Act to amend the Law relating to the Administration of the Estates of deceased persons. [18th July, 1855.] (*)

WHEREAS it is expedient that the law whereunder the real and personal assets of deceased persons are administered should be amended: Be it enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, as follows:—

When any person shall, after the thirty-first of December, one thousand eight hundred and fifty-five, die seized of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged, shall as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right to the mortgagee of such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid or otherwise: Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and fifty-six.

Heir or devisee of real estate not to claim payment of mortgage out of personal assets.

Not to affect rights claimed under any will, &c., before 1st January, 1856.

DECEASED WIFE'S SISTER (MARRIAGE WITH).

39 Vic. No. 20. An Act to declare valid the Marriage of a man with the Sister of his Deceased Wife. [Reserved, 21st July, 1875. Assent notified in *Gazette*, 26th May, 1876.]

WHEREAS doubts have arisen in New South Wales, as to the validity of the marriage of a man with the sister of his deceased wife, and it is expedient to remove such doubts: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

1. Every marriage otherwise lawful, which has been heretofore or which shall be hereafter celebrated within the Colony of New South Wales, between any person and the sister of his deceased wife, shall be deemed and is hereby declared to have been and to be valid and of full force and effect, any law or custom to the contrary notwithstanding.

Marriage with deceased wife's sister valid.

DESERTED WIVES AND CHILDREN.

22 Vic. No. 6. An Act to amend the Act for the Maintenance of Deserted Wives and Children. [25th August, 1858.]

4. A wife deserted by her husband may at any time after such desertion apply *ex parte* to the Supreme Court, or to any Judge thereof, (†) for an order to protect any personal property which she may acquire after such desertion, against her husband or his creditors or any person claiming under him, and such order shall in all cases be made on such Court or Judge being satisfied by affidavit of the fact of such desertion, and that the same was without reasonable cause, and shall contain a statement of the day of such desertion, and shall have the effect of protecting all personal property, acquired by such wife at any time after such desertion, from her husband and his creditors and all persons claiming under him; and while such order shall continue in force, such wife shall, with respect to such personal property as aforesaid, and to all contracts in reference thereto, and to all other contracts entered into by her after the making of such order, and not relating to real estate, be regarded in all respects as a *feme sole*; and if the husband or any of his creditors, or any person claiming under him shall, without the permission of the wife, seize, take, or hold possession of any property protected as aforesaid, such wife is hereby empowered to sue such husband, creditor, or other person for the restoration of the specific property seized, taken, or held as aforesaid, and to recover in such suit, in the event of such property not being restored, a sum equal to double the value of the same,

Wife may apply to Supreme Court or to a Judge for an order to protect personal property acquired by her after desertion by her husband.

(*) This Act is adopted from 17 & 18 Vic., cap. 113.

(†) Or District Court Judge under s. 31 of 22 V. No. 18.

with double costs of suit: Provided always, that it shall be lawful for the husband or any of his creditors, or any person claiming under him, at any time after the making of any such order as aforesaid, to apply on notice to the wife to the Supreme Court, or to any Judge thereof, that such order may be rescinded, and the same shall be rescinded in all cases where it shall be proved to the satisfaction of such Court or Judge, by affidavit or by *viâ voce* examination, or both, that such wife was not deserted without reasonable cause, or that since the making of the order she and her husband have cohabited or resided together, and on such order being so rescinded, the husband shall have and enjoy, with respect to all personal property protected by such order, the same rights as he would have had if such order had not been made, and shall be entitled to sue on any contracts which his wife may have made while such order was in force, and shall be liable to be sued on all such contracts in the same manner as though they had been made by his wife before his marriage with her.

5. Nothing in this Act shall take away or diminish the common law liability of a husband in respect to contracts made by a wife deserted by her husband without reasonable cause.

Common law
liability of hus-
band preserved

11 Geo. IV c. 65.

DISABILITIES ACT (PERSONS UNDER). (*)

DISTRIBUTIONS (STATUTES OF).

22 & 23 Charles II, c. 10. 1 James II, c. 17, s. 7. An Act for the better settling of Intestates.

THE following is the effect of the Statutes of Distributions, as given in *Watkins, on Conveyancing*, 8th Ed., p. 432.

It should be observed, in the first place, that the above Statute does not extend to the estate of a married woman, so that the husband takes the whole of her personal effects, he being entitled by the Common Law to administer to his deceased wife.

If the intestate leaves a widow and children, the widow takes one-third, and the children take the remaining two-thirds equally.

If he leaves a widow and no children, she takes a moiety, and the next of kin the other moiety as after-mentioned.

If he leaves no widow, the entirety is distributed among his children equally; and if he leaves but one child it devolves upon such only child.

If some of the children of the intestate die in his lifetime leaving children, such children or their lineal representatives *in infinitum* take *per stirpes* equally.

If all the children of the intestate die in his lifetime leaving children, such children, or if all of such children die in the lifetime of the intestate leaving children then all such grandchildren, take equally *per capita*, claiming in their own right and not by representation.

If all the children of the intestate die, after his decease, but before distribution is made, their shares vest at the decease of the intestate, and their lineal representatives *in infinitum* take *per stirpes* equally.

Where distribution is made among the children of the intestate, such children (excepting the heir-at-law) must bring into hotchpot any advancement made by the intestate in his life-time.

The lineal descendants of the intestate *in infinitum* are preferred to all descendants or collaterals.

If the intestate leaves neither widow, child, nor descendant of child, the next of kin are entitled; that is, the father if living takes the whole, but if dead the mother, brothers and sisters of the intestate take equally, the children of deceased brothers and sisters standing *in loco parentis*.

But this right of representation, being among collaterals, extends no farther than to the children of the brothers and sisters of the intestate; thus, a sister's son excludes a brother's grandson, and an uncle the son of a deceased aunt.

If there be neither brother nor sister, nor the child of a brother or sister, the mother takes the whole.

But a mother-in-law takes nothing. If there be no mother, the brothers and sisters take equally; and the children of a deceased brother or sister stand *in loco parentis*.

If there be neither mother, brother, sister, nor children representing a brother or sister, distribution is made, without preference, among those who are next in degree of kindred to the intestate, according to the civil law.

Paternal and maternal relations in equal degree take together.

Widow and
children.

Widow.

Children.

Children and the
representatives
of children.
Grandchildren.

Vesting of dis-
tributive shares.

Hotchpot.

Lineal descend-
ants.

Neither wife,
child, nor
descendant of
child.

Representation
among
collaterals.

Mother.

Brothers and sisters,
and descendants of
brothers and sisters.
Kindred next
after brothers
and sisters
representatives.
Paternal and
maternal relations.

(*) 11 Geo. IV c. 65, adopted by 5 W. IV No. 8, but not printed in this collection, as relating rather to Equity Procedure than to Property Law.

If there be neither mother, brother, sister, nor children representing a brother or Grandfather, &c. sister, the grandfather, or, if he is dead, the grandmother, takes, they being preferred before the children of a deceased brother or sister, claiming in their own right and not as representatives.

Next the grandfather, the great-grandfather (or, if he is dead, the great-grandmother), Great-grand-uncles, aunts, nephews, and nieces claiming in their own right, take together, as being in equal degree.

If there be none entitled in this degree, then the great-great-grandfather (or, if he is dead, the great-great-grandmother), Great-great-uncles, great-uncle, first-cousin (or uncle's son), and great-nephew, (or brother's grandson) take together, being equal in degree.

Distribution is not to be made until twelve months after the decease of the intestate. Distribution.

DISTRICT COURTS.

22 Vic. No. 18. An Act for establishing District Courts and for enabling the Judges thereof to act as Chairmen of Quarter Sessions. [12th November, 1858.]

7. All pleas of personal actions wherein the amount claimed is not more than two hundred pounds, whether on balance of account or after an admitted set-off, or otherwise, may be holden in the Courts established under this Act. Provided always that no such Court shall have cognizance of any action in which the title to land ⁽¹⁾ or the validity of any devise, bequest, or limitation under any will or settlement shall be in question, or shall have jurisdiction in any action for seduction or criminal conversation. Provided, nevertheless, that if such title as aforesaid shall incidentally come in question in any action, the Court shall have power to decide the claim which it is the immediate object of the action to enforce; but the judgment of the Court shall not be evidence of title between the parties, or their privies, in any other action in that Court, or in any proceedings in any other Court. In personal actions.

78. It shall be lawful for the Registrar of every such Court, by himself, or his deputies, to be by him appointed and duly authorized under his hand and seal, and for whose acts he shall be accountable during his continuance in such office and their employment by him, to seize and take under any writ of execution whereby he is directed to levy any sum of money, and to cause to be sold, all and singular the lands, tenements, and hereditaments, of or to which the person named in the said writ is or may be seized or entitled, or which he can either at Law or in Equity assign or dispose of. Registrar to take under writ of execution.

79. In case of any sale by the said Registrar, by himself or his deputy, of the right, title, and interest of any person of, to, or in any lands, or hereditaments, the said Registrar is hereby required to execute a proper deed of bargain and sale thereof to the purchaser, which deed of bargain and sale shall operate and be effectual as a conveyance of the estate, right, title, and interest of such person. Provided, nevertheless, that no such deed of bargain and sale shall so operate and be effectual as aforesaid, until the same shall have been duly registered in the proper office for the Registration of Deeds, and be indexed ⁽²⁾ in the index book thereof, in the name of the person whose interest in such lands and hereditaments is intended to be thereby conveyed. Registrar to execute bill sale.

80. It shall be lawful for a Bailiff of any of the said Courts, by himself, or his deputies to be by him appointed and duly authorised under his hand and seal, to seize and take under any writ of execution whereby he is directed to levy any sum of money, and to cause to be sold, all and singular the goods, chattels, and other personal property of, or to which the person named in the said writ is or may be possessed, or entitled, or which he can either at Law or in Equity assign or dispose of. Provided that the wearing apparel, bedding, tools, and implements of trade of the defendant and his family to the value of ten pounds in the whole, shall be protected from seizure. Bailiff to seize personal property.

81. No writ of execution under this Act shall bind any lands unless registered in the proper office for Registration of Deeds with the Registrar, who shall duly register the same in a book to be kept for that purpose. Executions not to bind land unless registered.

⁽¹⁾ *Per Hargrave, J.*, A conditional purchaser's right of occupying his selection before grant issued to him, is not a "title" in the technical sense used in the 7th section; and accordingly, although he is compellable to show his parliamentary right to occupy, he may do this in the District Court. *Ex parte M'Evoy*, 8, S. C. R., p. 16.

⁽²⁾ A free selector's conditional purchase was sold under an execution upon a judgment in a District Court. The Registrar executed a deed of bargain and sale to the purchaser; but this deed was not registered and indexed. The purchaser, however, having entered and ejected the former owner,—*held*, that the purchaser was a trespasser, as by the 79th section of the District Courts Act of 1858 the registration and indexing of such deeds of bargain and sale were indispensably requisite to give a title and right of entry. *Matthews v. Howell*, 10, S. C. R., p. 331.

Registrars and Bailiffs may sell by auction without license.

Priority of Executions issuing out of District Court:

Priority of Executions issuing out of Supreme Court and District Court.

82. The provisions of the first section of the Act of Council 13th Victoria No. 13 enabling Bailiffs of the Courts of Requests to sell by auction without a license shall apply to Registrars and Bailiffs of District Courts held under this Act, and to their assistants.

83. The precise time when any application shall be made to a Registrar to issue a Warrant or Writ of Execution against the lands or goods of a party, shall be entered by him in the Execution Book and on such Warrant or Writ, and when more than one such Warrant or Writ shall be delivered to any Registrar or Bailiff to be executed he shall execute them in the order of the times so entered.

84. When a Writ against the lands or goods of a party to any suit has issued out of the Supreme Court and a Warrant or Writ of Execution against the lands or goods of the same party has issued out of any District Court, the right to the property seized shall be determined by the priority of the time of the delivery of the Writ so issued out of the Supreme Court as aforesaid, to the Sheriff to be executed, or of the application to the Registrar for the issue from such District Court of the Warrant or Writ of Execution, and the Sheriff shall on demand inform the Registrar of the precise time of such delivery of the Writ so issued out of the Supreme Court as aforesaid, and the Registrar on demand shall inform the Sheriff, or any Sheriff's Officer, of the precise time of the application to such Registrar for the issue from such District Court of the Warrant or Writ of Execution. And any Warrant granted in pursuance of any Writ of Execution issued out of the Supreme Court, or any District Court, and the indorsement thereon. And any Warrant issued by the Registrar of any District Court authorizing the Bailiff of such District Court to give possession of premises, as herein-before mentioned, shall, respectively, be sufficient justification to any Registrar, Bailiff, or Sheriff's Officer acting thereon.

DOWER.

7 W. IV No. 8. An Act for adopting certain Acts of Parliament passed in the Third and Fourth Years of the Reign of His present Majesty King William the Fourth in the Administration of Justice in New South Wales in like manner as other Laws of England are applied therein. [12th August, 1836.]

Preamble.

3 and 4 Gul. IV. cap. 105.
3 and 4 Gul. IV. cap. 106.

Adopted and to be applied in the administration of justice.

Commencement of Act.

WHEREAS certain Acts of Parliament were passed in the third and fourth years of the reign of His present Majesty King William the Fourth, intituled respectively, "*An Act for the amendment of the Law relating to Dower*," and "*An Act for the amendment of the Law of Inheritance*"; and whereas, it is expedient to adopt and apply the said recited Acts of Parliament in the administration of justice in New South Wales: Be it therefore enacted, by His Excellency the Governor of New South Wales, with the advice of the Legislative Council thereof, That the said recited Acts of Parliament, and every clause, provision, and enactment therein respectively contained (save and except as hereinafter is provided), shall be, and the same are, and is hereby adopted and directed to be applied in the administration of justice in the said Colony and its Dependencies, in like manner as other Laws of England are therein applied.

2. And whereas it is expedient that the said recited Acts of Parliament should not commence or take effect in the Colony of New South Wales until the first day of January next ensuing: Be it enacted, That the said recited Acts of Parliament shall not commence or take effect in the Colony aforesaid before the first day of January, in the year one thousand eight hundred and thirty-seven, and that every clause and provision in said recited Acts, shall, from and after the said first day of January, have only the same force and effect in the Colony of New South Wales, as the same have had in His Majesty's Kingdom of England, from and after the thirty-first day of December, in the year one thousand eight hundred and thirty-three, and the first day of January, in the year one thousand eight hundred and thirty-four, respectively.

3 and 4 W. IV c. 105. An Act for the amendment of the Law relating to Dower. [29th August, 1833.]⁽¹⁾

Meaning of the words in the Act.

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned,

⁽¹⁾ An appointment under deed of conveyance to such uses as purchaser shall appoint, remainder to purchaser in fee, bars dower of purchaser's widow married before Dower Act. *Semble*, dower barred in equity after twenty years by analogy to Statute of Limitations. *Semble*, want of means to prosecute such claim not sufficient excuse of such *laches* as would ordinarily disentitle claimant to relief in equity. *Carr v. Howison*, 10, S. C. R., Eq., 107.

which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; that is to say, the word "Land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing.

2. And be it further enacted, That when a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint-tenancy), then his widow shall be entitled in equity to dower out of the same land.

3. And be it further enacted, That when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof: Provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

4. And be it further enacted, That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

5. And be it further enacted, That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

6. And be it further enacted, That a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

7. And be it further enacted, That a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land or out of any of his land.

8. And be it further enacted, That the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid.

9. And be it further enacted, That where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

10. And be it further enacted, That no gift or bequest made by any husband to be for the benefit of his widow or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

11. Provided always, and be it further enacted, That nothing in this Act contained shall prevent any Court of Equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands or any of them.

12. And be it further enacted, That nothing in this Act contained shall interfere with any Rule of Equity, or of any Ecclesiastical Court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

13. And be it further enacted, That no widow shall hereafter be entitled to dower *ad ostium ecclesie* or dower *ex assensu patris*.

14. And be it further enacted, That this Act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower.

"Land."

Number.

Widows to be entitled to dower out of equitable estates.

Seisin shall not be necessary to give title to dower.

No dower out of estates disposed of.

Priority to partial estates charges and specialty debts.

Dower may be barred by a declaration in a deed—

Or by a declaration in the husband's will.

Dower shall be subject to restrictions.

Devise of real estate to the widow shall bar her dower.

Bequests of personal estate to the widow shall not bar her dower.

Agreement not to bar dower may be enforced.

Legacies in bar of dower still entitled to preference.

Certain dowers abolished.

Act not to take effect before the 1st January 1834.

14 Vic. No. 27. An Act to amend the Law of Dower in certain respects. [1st October, 1850.]

WHEREAS titles to land in New South Wales are often unfairly prejudiced by claims of Dower made or maintainable by women who have never resided with their husbands in the said Colony, and of whose existence the purchasers of such land had no notice at the time of the sale thereof, by the husbands of such women: And whereas titles to

Preamble.

No claim for dower maintainable against a purchaser unless wife resident in the Colony before sale or fact of marriage known to purchaser.

Claim for dower against a purchaser limited to one-third of rent or estimated rent at time of sale.

land, subject to contingent claims of dower, are prejudiced to an extent beyond the just maintenance of such claims, and improvements upon property after sale thereof by the husbands of the claimants, are injuriously retarded by the apprehension of such claims being extended to the additional value resulting from such improvements: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, That no claim to dower, on the part of the widow of any deceased owner of land, shall have any force at Law or in Equity, against any person claiming by purchase from such owner for valuable consideration, unless it shall be proved that the claimant resided in New South Wales with, and as the wife of, such deceased owner before his sale of the land; or that the purchaser had notice before or at the time of sale, of the fact of the deceased owner having been married to the claimant; and in case the defendant resisting such claim shall derive title through the original purchaser from such deceased owner, it shall not be sufficient to prove such knowledge on the part of the original purchaser, without also showing that before the defendant purchased the land, either the claimant had resided with her husband in the said Colony, or the defendant had become acquainted with the said fact of marriage.

2. And be it enacted, That the claim to dower out of any land by the widow of any person who has or shall have alienated such land for valuable consideration, shall be limited to one-third of the estimated rent for the time being of such land, considered as if remaining in the state of improvement in which the same shall have been at the time of such alienation, and shall not be recoverable by metes and bounds, but shall be assignable by a Court of Equity only, with liberty nevertheless to such Court to direct the trial at law of any issue of fact on which the assessment of the claim shall depend.

See also *Uses, Statute of, and Real Estate of Intestates Distribution Act* (26 Victoria No. 20, sec. 2.)

EQUITY EXPENSES.

16 Vic. No. 3. An Act to diminish the delay and expense of proceedings in the Supreme Court in its jurisdiction as a Court of Equity and in Infancy and Lunacy. [27th July, 1852.] (*)

EQUITY PRACTICE.

17 Vic. No. 7. An Act to amend the Practice and Course of Proceeding in the Supreme Court in Equity. [8th July, 1853.]

WHEREAS it is expedient to amend the practice and course of proceeding in the Supreme Court in the Equity Branch of its Jurisdiction: Be it enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, as follows:—

36. It shall be lawful for any person claiming to be a creditor of any deceased person, or interested under his will, to apply for and obtain in a summary way, in the manner hereinbefore provided with respect to the personal estate of a deceased person, an order for the administration of the real estate of a deceased person where the whole of such real estate is by devise vested in trustees who are by the will empowered to sell such real estate, and authorized to give receipts for the rents and profits thereof, and for the produce of the sale of such real estate; and all the provisions hereinbefore contained with respect to the application for such order in relation to the personal estate of a deceased person, and consequent thereon, shall extend and be applicable to an application for such order as last hereinbefore mentioned with respect to real estate.

37. It shall be lawful for the Court in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct, and if the Court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem; provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the Court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court may think fit to impose on the party making such request.

(*) The title only of this Act is given, the Act itself being mainly one regulating procedure.

44. If after a suit shall have been instituted in the said Court, in its equitable jurisdiction, in relation to any real estate, it shall appear to the Court that it will be necessary or expedient that the said real estate or any part thereof should be sold for the purposes of such suit, it shall be lawful for the said Court to direct the same to be sold at any time after the institution thereof, and such sale shall be as valid to all intents and purposes as if directed to be made by a decree or decretal order on the hearing of such cause; and any party to the suit in possession of such estate, or in receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser or such other person as the Court shall direct.

Court may order real estate to be sold, if required.

45. Where any real or personal property shall form the subject of any proceedings in the Supreme Court in Equity, and the Court shall be satisfied that the same will be more than sufficient to answer all the claims thereon which ought to be provided for in such suit, it shall be lawful for the said Court, at any time after the commencement of such proceedings, to allow to the parties interested therein, or any one or more of them, the whole or part of the annual income of such real property, or a part of such personal property, or a part or the whole of the income thereof, up to such time as the said Court shall direct, and for that purpose to make such orders as may appear to the said Court necessary or expedient.

Where property is the subject of proceedings Court may allow to parties the annual income.

49. In cases where, according to the present practice of the Court in its Equity Jurisdiction, such Court declines to grant equitable relief until the legal title or right of the party or parties seeking such relief shall have been established in a proceeding at law, the said Court may itself determine such title or right without requiring the parties to proceed at law to establish the same.

Court may determine legal titles.

53. This Act shall commence and take effect on and from the first day of September now ensuing. (*) Provided that it shall be lawful for the said Judges to make and issue any such general rules or orders as aforesaid, at any time after the passing of this Act, so as the same be not made to take effect before the said first day of September.

Commencement of Act.

EQUITIES OF REDEMPTION—AND EQUITABLE INTERESTS

(SALE OF, BY SHERIFF). See *Advancement of Justice*.

EVIDENCE.

11 Vic. No. 38. An Act to facilitate the proof of Letters Patent or Deeds of Grant from the Crown. [2nd October, 1847.] See *Grants*.

13 Vic. No. 16. An Act to amend the Law of Evidence, and to facilitate the admission as Evidence of certain Official and other Documents; and to give Protection to Persons employed in the Printing and Publication of Papers by the order or authority of the Legislative Council or a Committee thereof. [7th August, 1849.]

WHEREAS it is provided by many Acts of the Legislative Council of the Colony of New South Wales, that various certificates, and official and public documents, and documents and proceedings of corporations, and of joint stock and other companies, and certified copies of documents, and by-laws and entries in registers and other books, shall be receivable in evidence of certain particulars in Courts of Justice, provided they be respectively authenticated in the manner prescribed by such Acts: And whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine: And whereas it is expedient to make provision for the admission in evidence of certain judgments, and other proceedings by the production of certified copies thereof; as also to facilitate the admission in evidence of such and the like documents Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, that copies of all judgments, decrees, rules, and orders, filed or recorded in the Supreme Court of the said Colony at Sydney, or in the Supreme Court of the said Colony for the District of Port Phillip, shall be admitted as evidence of the contents thereof by all Courts, Judges, Justices, and other Legal Tribunals, and in every judicial proceeding in the said Colony, without production of the originals of such documents respectively, provided the copies of such orders and decrees made in the Equitable Jurisdiction of the said Supreme Court at Sydney, be certified under the hand of the Master in Equity of the said Court; and that such copies of all judgments, decrees, rules, and orders, made in the Common Law and Ecclesiastical Jurisdiction of

Preamble.

Copies of judgments decrees rules and orders of Supreme Court to be received in evidence if duly certified by Master Prothonotary Chief Clerk or Deputy Registrar respectively.

the said Supreme Court at Sydney, be certified under the hand of the Prothonotary or Chief Clerk thereof, and that such copies of such orders, decrees, judgments, and rules, made either in the Equitable or in the Common Law, or in the Ecclesiastical Jurisdiction of the said Supreme Court for the District of Port Phillip, be respectively certified under the hand of the Deputy Registrar or other proper officer thereof.

Certain documents to be received in evidence without proof of signature or seal.

2. And be it enacted, that whenever by any Act now in force, or hereafter to be in force, any certificate, or official or public document, or document or proceeding of any corporation, or joint stock or other company, or any certified copy of any document, or by-law, or entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particulars in any Court of Justice, or before any Legal Tribunal or before the Legislative Council of the said Colony, or any Committee thereof or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, and signed, as directed by the respective Acts made, or to be hereafter made, without any proof of the seal or stamp where a seal or stamp is necessary, or of the signature, or of the official character of the persons appearing to have signed the same, and without any further proof thereof, in every case in which the original record or document could have been received in evidence.

Courts &c. to take judicial notice of signature of the Judges of Supreme Court and of certain officers thereof.

3. And be it enacted, That all Courts, Judges, Justices, Masters in Equity, Commissioners or other persons officiating judicially, shall henceforth take judicial notice of the signature of any of the Judges of the said Supreme Court of this Colony at Sydney, and any resident Judge of the said Supreme Court of the said Colony, resident at any other place in the said Colony, and also of the Prothonotary, and Master in Equity and Chief Clerk thereof respectively, and of the Deputy Registrar of the said Supreme Court for the District of Port Phillip: Provided such signature shall purport to be attached or appended to any decree, order, certificate, or other judicial or official document.

Copies of Private Acts of the Legislative Council, Proclamations and Commissions issued by the Governor and printed by the Government Printer, admissible as evidence.

4. And be it enacted, That all copies of the Private Acts of the Legislative Council of the said Colony, and all Proclamations and Commissions issued by His Excellency the Governor of the said Colony, or by the Officer administering the Government thereof, for the time being, if purporting to be printed by the Government Printer, or by the authority of the Government, shall be admitted *prima facie* evidence thereof by all Courts, Judges, Justices, and others, in the said Colony, without proof being given that such copies were so printed.

16 Vic. No. 14. An Act to amend the Law of Evidence. [19th August, 1852.]

WHEREAS it is expedient to amend the Law of Evidence in divers particulars: Be it therefore enacted by His Excellency the Governor of New South Wales by and with the advice and consent of the Legislative Council thereof as follows:—

Provisions of Will Act saved.

5. Nothing herein contained shall repeal any provision contained in the "Act for the amendment of the Laws with respect to Wills," adopted by the said Governor and Council in the third year of Her Majesty's reign.

Orders for inspection of documents.

6. Whenever any action or other legal proceeding shall henceforth be pending in the Supreme Court of this Colony, such Court and each of the Judges thereof, may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this Act a discovery might have been obtained by filing a bill, or by any other proceeding in a Court of Equity at the instance of the party so making application as aforesaid, to the said Court or Judge.

Evidence of Acts of State, and of Judgments in any British, Colonial, and Foreign Courts.

7. All proclamations, treaties, and other Acts of State of Great Britain, or of any Foreign State or British Colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in Great Britain, or of any Foreign State or British Colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such Court, may be proved in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a Proclamation, Treaty, or other Act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the Seal of Great Britain or of the Foreign State or British Colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding, of any British, Foreign, or Colonial Court, or an affidavit, pleading, or other legal document, filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed with the Seal of the Court to which the original document belongs, or in the event of such Court having no Seal,

to be signed by the Judge, or, if there be more than one Judge, by any one of the Judges of the said Court; and such Judge shall attach to his signature a statement in writing on the said copy, that the Court whereof he is a Judge has no Seal, but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the Seal, where a Seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

9. Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no Statute or Act of Council exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any Court of Justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding four-pence for every folio of ninety words.

Proof of books and documents of a public nature by certified copies or extracts.

12. This Act shall come into operation on the first day of October in this present year.

Commencement of Act.

20 Vic. No. 23. An Act to declare that Instruments affecting Real Estate in this Colony, executed out of the Colony, are admissible in Evidence therein, although not stamped. [Reserved, 11th March 1857. Assented to, 11th August, 1858.]

WHEREAS doubts exist whether Conveyances and other Instruments affecting Real Estate in this Colony, if executed at any place out of the Colony where Stamp Laws are in force, are admissible in evidence in this Colony without being stamped, and it is expedient to remove such doubts: Be it therefore declared and enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of New South Wales, in Parliament assembled, and by the authority of the same, as follows:—

1. No Conveyance or other Instrument affecting Real Estate within this Colony, or Power of Attorney authorizing the execution or registering of any such Conveyance or other Instrument wheresoever executed, shall be inadmissible in evidence in this Colony by reason of the same not being stamped.

No Deed affecting lands in the Colony to require stamps.

22 Vic. No. 7. An Act for the further amendment of the Law of Evidence. [25th August, 1858.]

6. When any writing whatsoever, shall have been copied by means of any machine, or press, which produces a fac-simile impression or copy of such writing, such impression or copy shall upon proof to the satisfaction of the Court or person having by law, or by consent of parties, authority to hear, receive, and examine evidence, that the same was taken or made from the original writing, by means of such machine or press as aforesaid, be *primâ facie* evidence of such writing, without any proof that such impression or copy was compared with the said original thereof, and without any notice to produce such original.

Machine copies to be evidence.

EVIDENCE (DOCUMENTARY).

31 & 32 Vic. c. 37. An Act to amend the Law relating to Documentary Evidence in certain cases. [25th June, 1868.]

31 & 32 Vic. c. 37.

WHEREAS it is expedient to amend the Law relating to Evidence: Be it enacted as follows:—

1. This act may be cited for all purposes as "The Documentary Evidence Act, 1868." Short title.
2. *Primâ facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under the authority of any such department of the Government or officer as is mentioned in the

Mode of proving certain documents.

EVIDENCE (DOCUMENTARY).

first column of the schedule hereto, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

- (1.) By the production of a copy of the *Gazette* purporting to contain such proclamation, order, or regulation.
- (2.) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government Printer, or, where the question arises in a court in any British Colony or Possession, of a copy purporting to be printed under the authority of the legislature of such British Colony or Possession.
- (3.) By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connexion with such department or officer.

Any copy or extract made in pursuance of this Act may be in print or writing, or partly in print and partly in writing.

No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation.

Act to be in force in Colonies.

3. Subject to any law that may be from time to time made by the legislature of any British Colony or Possession, this Act shall be in force in every such Colony and Possession.

Punishment of forgery.

4. If any person commits any of the offences following, that is to say,—

- (1.) Prints, any copy of any proclamation, order, or regulation which falsely purports to have been printed by the Government Printer, or to be printed under the authority of the Legislature of any British Colony or possession, or tenders in evidence any copy of any proclamation, order, or regulation which falsely purports to have been printed as aforesaid, knowing that the same was not so printed; or
- (2.) Forges or tenders in evidence, knowing the same to have been forged, any certificate by this Act authorized to be annexed to a copy of or extract from any proclamation, order, or regulation; he shall be guilty of felony, and shall, on conviction, be liable to be sentenced to penal servitude for such term as is prescribed by "The Penal Servitude Act, 1864," as the least term to which an offender can be sentenced to penal servitude, or to be imprisoned for any term not exceeding two years, with or without hard labour.

Definition of terms.

5. The following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such construction, that is to say:

"British Colony and Possession."

"British Colony and Possession" shall, for the purposes of this Act, include the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty by virtue of any Act of Parliament for the government of India and all other Her Majesty's dominions.

"Legislature."

"Legislature" shall signify any authority other than the Imperial Parliament, or Her Majesty in Council, competent to make laws for any Colony or Possession.

"Privy Council."

"Privy Council" shall include Her Majesty in Council, and the Lords and others of Her Majesty's Privy Council, or any of them, and any committee of the Privy Council, that is not specially named in the schedule hereto.

"Government printer."

"Government Printer" shall mean and include the printer to Her Majesty, and any printer purporting to be the printer authorized to print the Statutes, Ordinances, Acts of State, or other public Acts of the Legislature of any British Colony or Possession, or otherwise to be the Government Printer of such Colony or Possession.

"Gazette."

Gazette shall include the *London Gazette*, the *Edinburgh Gazette*, and the *Dublin Gazette*, or any of such *Gazettes*.

Act to be cumulative.

6. The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute or existing at common law.

EXECUTORS (STATUTE OF).

21 Henry VIII cap. 4. The Sale of Lands by part of the Executors lawful. [1529.]

Part of the executors who take upon them the charge of a will, may sell any

PREAMBLE, &c.: Be it enacted, &c., That where part of the executors named in any such testament of any such person so making or declaring any such will of any lands, tenements, or other hereditaments to be sold by his executors, after the death of any such testator, do refuse to take upon him or them the administration and

charge of the same testament and last will wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the care and charge of the same testament and last will,—that then all bargains and sales of such lands, tenements, or other hereditaments, so willed to be sold by the executors of any such testator, as well heretofore made as hereafter to be made by him or them only of the said executors that so doth accept, or that heretofore hath accepted and taken upon him or them any such care or charge of administration of any such will or testament, shall be as good and as effectual in the law as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in the making of the bargain and sale of such lands, tenements, or other hereditaments so willed to be sold by the executors of any such testator, which heretofore hath made or declared, or that hereafter shall make and declare any such will, of any such lands, tenements, or other hereditaments after his decease, to be sold by his executors.

land devised by the testator to be sold.

FELONS.

6 Vic. c. 7. An Act to amend the law affecting transported Convicts with respect to pardons and tickets of leave. [3rd April, 1843.]

Sect. 4. Provided always, and be it declared and enacted, That no felon under sentence of transportation who shall hold a ticket of leave shall be capable of acquiring or holding any estate in lands or tenements other than as tenant for years or for some less term or estate, determinable in each case upon the revocation of the ticket of leave, until after such felon shall have duly an absolute or conditional pardon from the Governor or Lieutenant Governor of the place to which he shall have been so transported, pursuant to the provisions hereinbefore contained.

Holders of tickets of leave declared incapable of holding real property.

FENCES.

9 Geo. IV No. 12. An Act to regulate the dividing Fences of adjoining Lands. [2nd August, 1828.]

WHEREAS it is expedient to make provision for the erecting and upholding of Fences, Preamble.

dividing Lands adjoining, and abutting on other Lands: Be it enacted by His Excellency the Governor of New South Wales, by and with the advice of the Legislative Council, That from and after the passing of this Act, it shall and may be lawful for the owner or owners of lands, adjoining or abutting upon any other lands, and having no sufficient dividing fence, to require, by writing, under his, her, or their hand or hands, the owner or owners, person or persons legally possessed of and holding any adjoining lands (excepting such lands as shall be held of the Crown, by temporary occupation only), his, her, or their agents respectively, to assist in equal proportions, to make or repair any or all the dividing fences, between such lands respectively; and in case the owner or owners of such adjoining lands, or person or persons legally possessed of and holding the same, or his, her, or their agent, shall refuse or shall neglect to assist, or fail to use due diligence in the making or repairing such dividing fences, for the space of six months after the receiving of such requisition or notice (or shall not give to the owner of such adjoining land, from whom he shall have received such requisition or notice, a sufficient and reasonable excuse for not having assisted in carrying such fencing or enclosure into effect), then, and in either such case, it shall and may be lawful for the owner or owners of such adjoining lands, who shall have given such requisition or notice as aforesaid, and who shall have completed, his, her, or their share of such dividing fence, to engage and contract with any person or persons, to complete and execute, or repair such dividing fence, and it shall be lawful for such person or persons, so giving notice as aforesaid, and his, her, or their servants or the person or persons, contracting to execute, complete, or repair such fencing, and his, her, or their servants respectively, to cut upon the farm or lands of the person or persons so neglecting, or refusing as aforesaid, all such indigenous timber, or other indigenous trees (excepting such as shall have been planted or preserved for ornament), and materials, as shall be necessary for executing and completing, or repairing such fencing and enclosing as aforesaid; and such owner or owners, contractor or contractors, his, her, or their servants respectively, shall not be answerable or chargeable for any act of trespass which he, she, or they respectively may have committed on such adjoining lands, for the purpose of cutting and carrying away any such indigenous timber as aforesaid; and in

Owners of land may require persons possessing the adjoining lands to assist in making and repairing the dividing fences.

case a sufficient quantity of the materials necessary for the executing and completing, or repairing of such fencing, cannot be obtained upon such adjoining lands, it shall be lawful for the person or persons, authorized to make and repair such dividing fences, or the person or persons with whom, he, she, or they shall so contract, to procure and purchase the materials necessary for the executing and completing, or repairing of such fencing; and all sums of money which shall or may be so expended or laid out under the provisions of this Act, shall be recoverable as for money laid out for the benefit of the owner or owners of such lands.⁽¹⁴⁾

Persons who shall enclose their lands before the lands adjoining have been granted shall be authorized to recover from any future proprietor one half of the actual value of the dividing fence.

2. And be it further enacted, That if any person or persons shall, from and after the passing of this Act, enclose his, her, or their lands, before the lands immediately adjoining as aforesaid shall have been duly granted by the Crown, or otherwise held as private property, the owner or owners of lands so enclosed, shall be authorized to claim and recover, from the person or persons who shall afterwards become the proprietor or proprietors of such adjoining lands one-half of the actual value of the wall, hedge, or fence, forming the dividing line or fence between the said adjoining lands, and such value shall be ascertained immediately, or as soon as may be, after such adjoining land shall have been granted by the Crown, or otherwise held as private property as aforesaid, by the arbitration of two persons, to be mutually chosen by the parties, and the amount which shall be awarded under such arbitration, as one-half of the value of such dividing fence, shall be recoverable by due course of law, if not paid within twelve months after the date of the award: Provided always, That in case such two persons, so mutually chosen as aforesaid, shall not agree in the amount of the sum to be paid for one-half of the value of such dividing fence, within the space of one calendar month next after such reference shall be made to them, then, and in such case, the same shall be referred to the determination of such indifferent person as the said arbitrators, by any writing under their hands, shall nominate and appoint as umpire in the case; and the decision of such umpire shall be conclusive: Provided also, That in case either of the parties in difference shall neglect or refuse, for the space of one calendar month, after notice in writing, given by the other party for that purpose, to join in the appointment of such arbitrators as aforesaid, it shall and may be lawful for the arbitrator to be chosen by the party giving such notice, to make an award *ex parte*, which shall be binding and conclusive, in like manner as if the party so neglecting or refusing had chosen an arbitrator, who had actually joined and made an award therein.

Cases of dispute to be referred to arbitration.

3. Provided always, and be it further enacted, That in all cases where there shall be natural boundaries between adjoining land, or where any dispute or difference shall arise between the respective owners or persons legally possessed of such adjoining lands, as to the necessity or sufficiency of any dividing fence as aforesaid, then, and in every such case, the same shall be referred to arbitration in like manner, and shall be subject to the like award and final decision as hereinbefore provided and directed with respect to the value of dividing lines or fences as aforesaid.

FRAUDS (STATUTE OF).

29 Car 2 c. 3. An Act for prevention of Frauds and Perjuries. [1676.] (*)

Parol leases and interest of freehold shall have the force of estates at will only.

"For prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury:" Be it enacted, that all leases, estates, interests of freehold or terms of years, or any uncertain interest, of, in, to, or out of any messuages, manors, lands, tenements, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates *at will* only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect—any consideration for making any such parol, leases, or estates to the contrary notwithstanding.

(*) For sections of this Act relating to devises, see title "Wills," *post*.

⁽¹⁴⁾ In an action in a District Court, for money paid and laid out for the defendant in fencing a side line between the plaintiff and defendant's properties, of which notice had been given under the 9 Geo. IV No. 12, plaintiff had written a letter to the defendant, as follows:—"I wish to apprise you that it is my intention to have, within six months' time from this day, a new three-railed fence completed between my land and your property, now in the occupation of Mr. L., &c." *Held*, that the notice was sufficient within the statute. *Held* also, that the defendant was liable under the Act as owner, although the land was, at the time of both the notice and the fencing, under lease. *Semble* (*per* Stephen, C.J.), that the tenant is also liable under the Act. *Parker v. Bowman*, 6, S. C. R., 101.

II. Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised.

Except leases not exceeding three years, &c.

III. And, moreover, That no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments shall at any time after the said four and twentieth day of June be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents, thereunto lawfully authorized by writing or by act or operation of law.

No leases or estates of freehold shall be assigned, granted, or surrendered by word.

IV. And be it further enacted, That no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them⁽¹⁵⁾; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

Promises and agreements by parol.

VII. And be it further enacted, That all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

All declarations or creations of trusts shall be in writing.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by any act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this Statute had not been made, anything hereinbefore contained to the contrary notwithstanding.

Trusts arising, transferred, or extinguished by implication or law not excepted.

IX. And be it further enacted, That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.

Assignments of trust in writing.

X. And be it further enacted, That it shall and may be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance hereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution shall be so sued had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments of such estate as they be seised of in trust for him at the time of the said execution sued; which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued; and if any *cestuy que trust* hereafter shall die, leaving a trust in fee simple to descend to his heir, then and in every such case such trust shall be deemed and taken and is hereby declared to be assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets as fully and amply as he might or ought to have been if the estate in law had descended to him in like manner as the trust descended, any law, custom, or usage to the contrary in anywise notwithstanding.

Lands, &c., shall be liable to the judgment of *cestuy que trust*—

and held free from the incumbrances of the persons seised in trust.

Trusts shall be assets in the hands of heirs.

XI. Provided always, That no heir that shall become chargeable by reason of any estate or trust made assets in his hands by this law, shall by reason of any kind of plea, or confession of the action, or suffering judgment by *nient dedire*, or any other matter, be chargeable to pay the condemnation out of his own estate; but execution shall be sued of the whole estate so made assets in his hands by descent, in whose hands soever it shall come after the writ purchased in the same manner as it is to be at and by the common law, where the heir at law pleading a true plea, judgment is prayed against him thereupon; anything in this present Act contained to the contrary notwithstanding.

No heir shall by reason thereof become chargeable of his own estate.

⁽¹⁵⁾ A sale of a then growing crop of oranges, with power to the purchaser to enter and pick them during the ensuing eleven months, is not a sale of an interest in or concerning land within the 4th section of the Statute of Frauds. *Cullan v. Pearse*, 3, S.C.R., p. 200; and see *Hogan v. Hogan*, 7, S.C.R., Eq., 81.

XIII. "And whereas it hath been found mischievous that judgments in the King's Courts at Westminster do many times relate to the first day of the term whereof they are entered, or to the day of the return of the original or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged or suffered and signed in the vacation time after the said term, whereby many times purchasers feel themselves aggrieved:"

The day of signing any judgment shall be entered on the margin of the roll.

XIV. Be it enacted, That any Judge or officer of any of His Majesty's Courts of Westminster that shall sign any judgments, shall, at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing upon the paper, book, docket, or record which he shall sign, which day of the month and year shall be also entered upon the margin of the roll of the record where the said judgment shall be entered.

And such judgment as against purchasers shall relate to such time only.

XV. And be it enacted, That such judgments as against purchasers *bond fide* for valuable consideration of lands, tenements, or hereditaments, to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of the return of the original, or filing the bail—any law, usage, or course of any Court to the contrary notwithstanding.

Writs of execution shall bind the property of goods but from the time of their delivery to the officer.

XVI. And be it further enacted, That no writ of *fi fieri facias* or other writ of execution shall bind the property of the goods against whom such writ of execution is sued forth but from the time that such writ shall be delivered to the Sheriff, Under Sheriff, or Coroners to be executed: And for the better manifestation of the said time, the Sheriff, Under Sheriff, and Coroners, their deputies and agents, shall, upon the receipt of any such writ (without fee for doing the same), endorse upon the back thereof the day of the month or year whereon he or they received the same.

Contracts for sales of goods for £10 or more.

XVII. And be it further enacted, That no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.

The day of the enrolment of recognizances shall be set down, and lands in the hands of purchasers bound from that time only.

XVIII. That the day of the month and year of the enrolment of the recognizances shall be set down in the margin of the roll where the said recognizances are enrolled; and that no recognizance shall bind any lands, tenements, or hereditaments, in the hands of any purchaser *bond fide* and for valuable consideration, but from the time of such enrolment,—any law, usage, or course of any court to the contrary in any wise notwithstanding.

22 & 23 Car. 2, c. 10.

Husbands not compellable to distribute estate of wives.

XXV. And for the explaining one Act of this present Parliament, intituled, "*An Act for the better settling of Intestates' Estates*," be it declared by the authority aforesaid, That neither the said Act, nor anything therein contained, shall be construed to extend to the estates of *Jemes covertes* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act.

[Made perpetual by 1 Jac. 2 c. 17, s.5.]

FRIENDLY AND OTHER MUTUAL BENEFIT SOCIETIES.

37 Vic. No. 4. An Act to consolidate and amend the Law relating to Friendly and other Mutual Benefit Societies. [28th November, 1873.]

Building for Society's purpose may be purchased or leased.

32. It shall be lawful for the Trustees for the time being of any Friendly Society formed and established under this Act, or under any of the Acts hereby repealed, with the consent of the majority of the members thereof present at a special meeting of the Society, to purchase, build, hire, or take upon lease any building for the purpose of holding such meetings and to adapt and furnish the same, or to purchase or hold upon lease any land for the said purpose of erecting thereupon a building for holding the meetings of the Society, and such Trustees shall thereupon hold the same in trust for the use of such Society; and with the like consent as aforesaid, such Trustees may mortgage, sell, exchange, or let such building or any part thereof, and the receipt in writing of such Trustees for the time being shall be a legal discharge for the money arising from such mortgage, sale, exchange, or letting; and no mortgagee, purchaser, tenant, or assignee shall be bound to inquire into or ascertain or prove the consent aforesaid, to verify his title: Provided always, that any building purchased, or appropriated for the purpose aforesaid, already belonging to, or in possession of, any such Society heretofore formed and established under any of the said repealed Acts, may be holden and dealt with, as if it had been acquired under this Act, and the land or buildings, which may be vested in the treasurer, Trustees, or other officer thereof for the time being, shall thereupon vest in the Trustees

for the time being of such Society, for the same estate and interest as the said treasurer, Trustees, or other officer may have therein, without any conveyance or assignment whatever: Provided nevertheless that all money spent in purchasing, building, hiring, or taking upon lease, any building, for the purpose of holding such meetings, and in adapting and furnishing the same, be raised according to the rules of the Society in such behalf inserted.

83. All real and personal estate whatsoever, belonging to any such Society established under this Act or any of the Acts hereby repealed, shall be vested in such Trustees for the time being, for the use and benefit of such Society and the members thereof; and the real or personal estate of any branch of a Society shall be vested in the Trustees of such branch, and be under the control of such Trustees, their respective executors or administrators, according to their respective claims and interests; and upon the death or removal of any such Trustee, the same shall vest in the succeeding Trustee or Trustees, for the same estate and interest as the former Trustee or Trustees had therein, and subject to the same trusts, without any conveyance or assignment whatsoever; and in all actions or suits or indictments or summary proceedings before magistrates touching or concerning any such property, the same shall be stated to be the property of the person or persons for the time being holding the said office of Trustee or Trustees, in his or their proper name or names as Trustee or Trustees of such Society, without any further description.

Property of Societies vested in Trustees.

84. The Trustees of any such Societies are hereby authorized to bring or defend, or cause to be brought or defended, any action, suit, or prosecution, in any Court of Law or Equity, touching or concerning the property, right, or claim to property of the Society for which he or they are such Trustees as aforesaid, and such Trustees shall and may in all cases concerning the real or personal property of such Society, sue and be sued, plead and be impleaded, in any Court of Law or Equity in their proper name or names as Trustees of such Society, without other description, and no such action suit or prosecution shall be discontinued or shall abate by the death of any Trustee, or his removal from the office of Trustee, but the same shall and may be proceeded in, by, or against the succeeding Trustee or Trustees, as if such death or removal had not taken place, and such succeeding Trustee or Trustees shall pay or receive the like costs as if the action or suit or prosecution had been commenced in his or their name or names for the benefit of, or to be reimbursed from, the funds of such Society.

Actions, &c., by or against them.

85. Provided nevertheless, that no Trustee of any such Society shall be liable to make good any deficiency which may arise or happen in the funds of such Society, but shall be liable only for the money which shall be actually received by him on account of such Society.

Limitation of Trustees' responsibility.

86. In any proceedings against any such Society, established under this Act or any of the Acts hereby repealed, it shall be sufficient to make the secretary or other public officer of such Society the defendant in such proceedings, by his name and the title of the office he holds in the Society, and such proceedings shall be commenced and carried on against such officer, on behalf of such Society, and shall not be abated or prejudiced by the death, resignation, or removal, or by any act of such officer after the commencement thereof, and the summons to be issued to such officer may be served by leaving it at the office or place of business of such Society.

Proceedings.

42. The Trustees of any such Society established under this Act or any of the said repealed Acts, from time to time, with the consent of the committee of management of such Society, or of a majority of the members of such Society present at a general or special meeting thereof, or in accordance with the rules of such Society, may deposit the funds of such Society in any Government Savings' Bank, or invest such funds or any part thereof to any amount in any Colonial Government Fund or Debentures, or in such other security as the rules of such Society may direct, not being the purchase of house or land (save and except the purchase of buildings wherein to hold the meetings or transact the business of such Society, as hereinbefore mentioned), and not being the purchase of shares in any joint stock or other company with or without charter or incorporation, and not being personal security, except in the case of a member of one full year's standing at least, and in respect of a sum not exceeding one-half the amount of his assurance on life, such member providing the written security of himself and two satisfactory sureties for repayment, and in case of such member's death before repayment, the amount of such advance with interest money be deducted from the sum so assured, without prejudice in the meantime to the operation of such security.

Funds how invested.

PART IV.

BENEFIT BUILDING LOAN AND INVESTMENT SOCIETIES.

49. It shall be lawful for any number of persons to form themselves into and establish Societies—

For what purposes Benefit Building and other Societies may be established.

- (1.) For the purpose of raising by the monthly or other subscriptions of the several members of such Societies, in shares not exceeding the value of two hundred

pounds for each share (such subscriptions not to exceed thirty shillings per month for each share), a stock or fund for the purpose of enabling each member thereof to receive out of the funds of such Society the amount or value of his share or shares therein and to erect or purchase a dwelling-house or dwelling-houses, or to acquire other real or leasehold estate to be secured by way of mortgage to such Society until the amount or value of his share shall have been fully repaid to such Society with the interest thereon, and all fines or other payments incurred in respect thereof.

- (2.) For creating a loan fund for the use of members, with a periodical repayment of principal and interest by instalments.
- (3.) For any other purpose of mutual benefit and advantage to the members only, which the Law Officers of the Crown shall certify to be legal, and such as in their opinion is deserving of the extension thereto of the facilities and privileges by this Act conferred on Societies within the meaning of this Part.

And such persons may make rules subject to the provisions of this Act for the better carrying out any of the aforesaid purposes.

Rules to contain certain particulars.

50. The rules of every Society so to be established, shall provide for the several particulars following (that is to say)—

- (1.) The name, objects, and place of business of the Society.
- (2.) The mode of appointing a committee of management, and their duties and powers.
- (3.) The mode of appointing and removing officers of the Society.
- (4.) The number of shares to be held by any one member.
- (5.) The manner of making new rules and altering or repealing existing rules.
- (6.) The manner of settling disputes between the Society and any officer or member thereof, or person claiming on account of a member.
- (7.) The manner of collecting the subscriptions of the members, of providing for the safe keeping thereof, and mode of investing and applying the same and the other funds of the Society to the purposes of the Society.
- (8.) The auditing of accounts, and the publication of a general balance of the assets and liabilities of the Society at least once a year.
- (9.) The faithful performance of their duties by the paid officers of the Society, having the custody or management of any moneys of the Society, and the amount and nature of security to be given by such officers.
- (10.) The manner of winding up the affairs of the Society and dissolving the same and distributing the assets thereof.

Proviso as to dividends.

51. No member shall receive or be entitled to receive from the funds of any such Society, established under this or the Act hereby repealed relating to Benefit Building Societies, any interest or dividend by way of annual or other periodical profit upon any shares in such Society, until the amount or value of his shares shall have been realized, except on the withdrawal of such member according to the rules of such Society.

Society may receive sums of money by way of bonus.

52. It shall be lawful for any such Society to receive from any member thereof any sum of money by way of bonus on any share or shares, for the privilege of receiving the same in advance, prior to the same being realized, and also any interest for the share or shares so received or any part thereof.

Forms of conveyance, &c., may be specified in Schedule to Rules.

53. It shall be lawful for any such Society, in and by the rules thereof, to describe the form or forms of conveyance, mortgage, transfer, agreement, bond, or other instrument which may be necessary for carrying the purposes of the said Society into execution, and which shall be specified and set forth in a Schedule to be annexed to the rules of such Society.

Receipts of Trustees to act as reconveyances.

54. The Trustees named in any mortgage, whether already made or hereafter to be made, on behalf of any Society established under this Act or the Act relating to Benefit Building Societies hereby repealed, or the survivors or survivor of them, or the Trustees for the time being, may endorse upon any mortgage or further charge given or to be given by any member of any such Society to the Trustees thereof, for moneys advanced or to be advanced by any such Society to any member thereof, a receipt for all moneys intended to be secured by such mortgage or further charge, which receipt shall be sufficient and effectual to vacate the said security, and to vest the estate of and in the property comprised in such security, in the person or persons for the time being entitled to the equity of redemption, to the uses and upon the trusts, to or upon which the equity of redemption then stands limited, without it being necessary for the Trustees of any such Society to give or execute any reconveyance of the property so mortgaged: Provided always that the form of such receipt shall be specified in a schedule to be annexed to the rules of such Society.

What shall be evidence of appointment of Trustee.

55. A copy of any resolution appointing any person to the office of Trustee of any such Society, and signed by the secretary and any three members thereof, deposited with the Registrar, shall be conclusive evidence as to the fact of such appointment, and of its sufficiency in favour of all persons accepting any conveyance or release or otherwise dealing with such trustee. And no such person shall be bound to inquire into the

particulars of any such appointment, except as disclosed by the copy of resolution so deposited, or prejudiced by any breach or neglect of the rules of such Society, or provisions of this Act in reference thereto.

56. The following sections of Part III of this Act shall and may be applied to every Society heretofore or hereafter to be established, for any of the purposes hereinbefore in this Part mentioned or referred to, unless the rules of such Society make other provision in respect of the several matters in the said sections contained inconsistent with the application thereof to such Society (that is to say) —

With reference to the dissolution of Societies, and the awards of the Registrar, Sections 21 to 26 inclusive.

With reference to the union of Societies and transfer of engagements, Section 27.

With reference to appointment of Trustees, Section 28.

With reference to minors and list of charges, Sections 29 and 31.

With reference to purchase or lease of buildings for holding meetings, &c., Section 32.

With reference to vesting of property in Trustees, actions by or against them, limitation of their liability, and proceedings against a Society, Sections 33 to 36 inclusive.

With reference to security by and accountability of treasurer, Sections 37 and 38.

With reference to recovery of property on death or insolvency of officers, Section 39.

With reference to returns to Registrar, Sections 45 and 46.

And for the purpose of the better giving effect to the provisions of this section, all words and expressions in the said sections or any of them, shall bear such extended or qualified meanings as may be necessary to make the provisions of the said sections applicable hereto.

PART V.

CO-OPERATIVE TRADING AND INDUSTRIAL SOCIETIES.

57. Any number of persons, not being less than seven, may establish a Society under this Act for the purpose of carrying on any labour, trade, or handicraft, whether wholesale or retail, except the business of banking, which the members of such Society voluntarily unite to carry on or exercise, and of applying the profits to any lawful purposes; and the buying and selling of land, and the working of mines and quarries, shall be deemed to be a trade within the meaning of this section.

58. The rules of every such Society shall contain provisions in respect of the several matters following, viz. :—

- (1.) Object, name, and place of office of the Society, which must in all cases be registered as one of limited liability.
- (2.) Terms of admission of members.
- (3.) Mode of holding meetings and right of voting and of making or altering rules.
- (4.) Determination whether the shares or any number thereof shall be transferable or not, and in case it be determined that the shares or any number thereof shall be transferable, provisions for the form of transfer and registration of shares, and for the consent of committee of management, and confirmation by the general meeting of the Society, and in case shares shall not be transferable, provision for paying to members balance due to them on withdrawing from the Society.
- (5.) Provision for the audit of accounts.
- (6.) Power to invest part of capital in another Society: Provided that no such investment be made in any other Society not registered under this Act.
- (7.) Power and mode of withdrawing from the Society, and provisions for the claims of executors, administrators, or assigns of members.
- (8.) Mode of application of profits.
- (9.) Appointment of managers and other officers, and their respective powers and remuneration.

59. A certificate of registration, according to the form set forth in the third Schedule hereto, shall be given by the Registrar in all cases where the requirements of this Act have been complied with, and such certificate shall in all cases be conclusive evidence that the Society mentioned therein has been duly registered.

60. The granting of such certificate to a Society by the Registrar shall have the effect of incorporating the members of such Society by the name described in such certificate, with perpetual succession and a common seal, with power to hold lands and buildings and to erect, purchase, lease, mortgage, sell, and convey the same respectively, and with limited liability as hereinafter provided.

61. The certificate of registration shall vest in the Society all the property that may at the time be vested in any person in trust for the Society; and all legal proceedings then pending by or against any such person or any other officer on account of the Society, may be prosecuted by or against the Society in its registered name without abatement.

Constitution of Societies under Part V.

Rules to contain certain particulars.

Registration of Society.

Incorporation of Society.

Certificate to vest all property of Society previously held in trust.

FRIENDLY SOCIETIES, &c.

Signature and
effect of rules.

69. The rules of every such Society shall bind the Society, and the members thereof, to the same extent as if each member had subscribed his name and affixed his seal thereto, and as if there were in such rules contained a covenant on the part of himself, his heirs, executors, and administrators to conform to such rules, subject to the provision of this Act, and all moneys payable by any member to the Society in pursuance of such rules shall be deemed to be a debt due from such member to the Society.

SECOND SCHEDULE.

Scale of Fees payable to Registrar.

	For Friendly Societies within the meaning of Part III.	For Benefit Building and other Societies within Part IV.	For Co-operative Trading and Indus- trial Societies within Part V.
	£ s. d.	£ s. d.	£ s. d.
Certificate of rules of new Society	1 1 0	2 2 0	2 2 0
Certificate of new or amended rule or change of name.....	0 5 0	0 10 6	0 10 6
Award	8 8 0	5 5 0	.....

GRANTS (OF LAND) CONFIRMATION.

6 W. IV No. 16. An Act to remove doubts concerning the validity of Grants of Land in New South Wales. [9th June, 1836.]

Preamble.

WHEREAS the Governors, Lieutenant Governors, and persons administering the Government of New South Wales, have from time to time been authorized and empowered by His present Majesty, and His Majesty's two last Royal predecessors, by Commission under the Great Seal, to grant and dispose of the waste lands of New South Wales: And whereas, in exercise of the power and authority in them so vested as aforesaid, the respective Governors, Lieutenant Governors, or persons administering the Government of New South Wales, have from time to time made and issued grants or conveyances of lands situated in the said Colony to divers of His Majesty's subjects; but such grants or conveyances have been made in the names of the said Governors, Lieutenant Governors, or persons administering the Government for the time being, and not in the name of His Majesty, or either of His Majesty's Royal predecessors: And whereas doubts have been entertained whether such grants or conveyances made and issued as aforesaid, by reason of the informality thereof, are valid in the law, or binding upon His Majesty, his heirs, and successors: And whereas to remove such doubts, and quiet the titles of His Majesty's subjects holding or entitled to hold any lands in New South Wales so granted or conveyed as aforesaid, His Majesty hath, through the Right Honorable Charles Viscount Glenelg, one of His Majesty's Principal Secretaries of State, graciously signified his Royal will and pleasure that all grants or conveyances of land made by any such Governor, Lieutenant Governor, or person lawfully administering the Government for the time being, in the exercise or supposed exercise of the powers and authorities in them so vested as aforesaid, should be declared to be valid in the law, and binding upon His Majesty, his heirs, and successors: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, That all grants, deeds, or conveyances, at any time heretofore made and issued by or in the name of any Governor, Lieutenant Governor, or person lawfully administering the Government of New South Wales, of any lands situated in the said Colony, and notwithstanding such grants, deeds, or conveyances shall not be in the name of His Majesty, or of either of His Majesty's two last Royal predecessors, shall be and be deemed, taken, and held to be, and to have been, from the respective dates thereof, as valid and effectual in the law to grant and convey such lands, and shall be as binding upon his said Majesty, his heirs, and successors, to all intents and purposes, as if such grants, deeds, or conveyances, had been made and issued in the name of His Majesty, or of either of His Majesty's two last Royal predecessors, and had passed and been executed under the Public Seal of the said Colony, and had been recorded in the most regular form of law, anything in any Act, law, custom, or usage to the contrary in anywise notwithstanding.

Declaring the
validity of grants
to land hitherto
issued by the
Governors of the
Colony.

3 Vic. No. 1. An Act to remove doubts concerning the Validity of certain Grants of Land in New South Wales. [3rd July, 1839.]

WHEREAS certain grants or conveyances of parts of the waste lands of the Crown in the Colony of New South Wales have been made and issued to divers persons under the Great Seal of the Colony, and in the name of His late Majesty King William the Fourth, between the twentieth day of June, in the year one thousand eight hundred and thirty-seven, being the day of the demise of His said late Majesty, and the twenty-fifth day of October in the same year, on which last-mentioned day the intelligence of the said demise first reached the said Colony: And whereas doubts have been entertained whether such grants or conveyances made and issued as aforesaid are valid in law, or binding upon Her Majesty, Her Heirs, and Successors: And whereas to remove such doubts, and to quiet the titles of Her Majesty's subjects, holding or entitled to hold any lands in New South Wales so granted or conveyed as aforesaid, Her Majesty hath, through the Right Honorable Charles Lord Glenelg, one of Her Majesty's Principal Secretaries of State, been graciously pleased to signify Her Royal will and pleasure that all grants or conveyances of lands made or issued by the Governor of the said Colony under the Great Seal of the same, and in the name of His said late Majesty during the time aforesaid, in the exercise or supposed exercise of the powers and authorities vested in him as said Governor, should be valid in law and binding upon Her Majesty, Her Heirs, and Successors: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice of the Legislative Council thereof, That all grants, deeds, or conveyances of any lands situated in the said Colony, that have been made or issued in the name of His said late Majesty King William the Fourth, at any time after the demise of His said Majesty, and on or before the twenty-fifth day of October, in the year aforesaid, being the day on which the said demise was known in the said Colony, shall be and shall be deemed, taken, and held to be and to have been from the respective dates thereof, as valid and effectual in law to grant and convey such lands, and shall be as binding upon Her Majesty, Her Heirs, and Successors, to all intents and purposes, as if such grants, deeds, or conveyances had been made and issued in the name of Her present Majesty Queen Victoria, and had been recorded in the most regular form of law, anything in any Act, or law, or usage to the contrary in anywise notwithstanding.

All grants, deeds, or Conveyances made or issued during the period between the day of the demise of His late Majesty King William the Fourth and the date of the receipt in this Colony of the intelligence of such demise to be as valid in law and as binding upon Her present Majesty, Her Heirs and Successors, as if the same had been made or issued in the name of her said present Majesty.

11 Vic. No. 54. An Act to remove doubts concerning the validity of certain Grants of Land in the City of Sydney. (*)

WHEREAS, by a proclamation, bearing date the eighth day of June, one thousand eight hundred and twenty-nine, made and published by His Excellency Lieutenant General Ralph Darling, then Captain General and Governor-in-Chief of the Colony of New South Wales, reciting that much inconvenience had been occasioned by the want of sufficient titles for allotments of land in the town of Sydney, and that such titles had not been issued by the Government, except in a few instances, since the thirtieth day of June, one thousand eight hundred and twenty-three, in order to remedy the said inconvenience and to give the necessary security to private property, it was thereby ordained and proclaimed that, on application being made, a grant in fee simple should be issued under the conditions in the said proclamation specified, to every person or his lawful representative who, on or before the said thirtieth day of June, one thousand eight hundred and twenty-three, was *bona fide* in possession, by lease from the Government, whether such lease was then expired or not, or by mere right of occupancy of any allotment of land in the town of Sydney which had not theretofore been alienated by the Crown, and not specified in a certain order of the Government, bearing even date with the said Proclamation, number thirty, or otherwise notified theretofore, as being required for public purposes, reserving, however, and keeping harmless all rights of other private individuals which might be lawfully established at any time thereafter: And whereas since the issuing of the said Proclamation grants in fee simple of allotments of land in Sydney, which had been before leased by the Government, have from time to time been made and issued to divers persons claiming the said land under the terms and conditions set forth in the said Proclamation: And whereas at the time of making and issuing of divers of the said grants leases of the said lands which had been issued by the Government were unexpired, and the said leases were not surrendered nor cancelled nor recited nor mentioned in the said grants: And whereas doubts have been entertained whether such grants or conveyances, made and issued as aforesaid, are valid in the law, and it is expedient that such doubts should be removed: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and con-

Preamble.

Recital of Proclamation, 8th day of June, 1829.

* This Act was disallowed and an Imperial Act substituted re-enacting its provisions and language, viz., 12 Vic. cap. 22. The enactments are quite identical.

GRANTS OF LAND (CONFIRMATION).

Grants issued in the name of the Governor for the time being, or of Her Majesty's predecessors, King George IV. or King William IV., or in the name of Her present Majesty Queen Victoria, to be valid.

As to lands erroneously granted.

sent of the Legislative Council thereof, That all grants made and issued after the date and publication of the said Proclamation, by or in the name of the Governor or person administering the Government of the said Colony for the time being, or in the name of Her Majesty's Predecessors, King George the Fourth or King William the Fourth, or by or in the name of Her present Majesty Queen Victoria, of any lands situated in Sydney; and notwithstanding that the leases which had been issued of the same lands were at the time of the making and issuing of such grants unexpired, and that such leases were not recited in the said grants, shall be and shall be deemed taken, and held to be and to have been from the respective dates thereof as valid and effectual in the law, to grant and convey such lands to all intents and purposes as if such leases had been surrendered, cancelled, or recited, and set forth in the said grants, anything in any Act, law, custom, or usage to the contrary notwithstanding.

2. Provided always and be it enacted, That nothing in this Act contained shall be deemed or taken to affect or prejudice the rights of any person or persons to any lands or hereditaments which shall have been or shall be erroneously or wrongfully granted to any grantee thereof, contrary to the true intent and meaning of the said Proclamation, anything in any such grant or in this Act to the contrary notwithstanding.

GRANTS (PROOF OF).

11 Vic. No. 38. An Act to facilitate the proof of Letters Patent or Deeds of Grant from the Crown. [2nd October, 1847.]

Preamble.

WHEREAS it is expedient to facilitate the proof in all Courts of Law and Equity, and in all other Courts in the Colony of New South Wales, of the contents of Letters Patent and Deeds of Grant from the Crown, by which land in the said Colony hath been, or shall after the passing of this Act, be granted to any person or persons whomsoever for any estate or interest: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, That every entry or copy now kept, or hereafter to be kept, as of record, or for public or official purposes, in the office of the Colonial Secretary, or of the Registrar General of the said Colony, or of the Deputy Registrar of the Supreme Court at Port Phillip, purporting to be an entry or copy of any Letters Patent or Deed of Grant from the Crown of any land situated in the said Colony, to any person or persons whomsoever, shall, in case the Letters Patent, or Deed of Grant, of which the same purports to be an entry or copy, shall not be produced in evidence, be deemed and taken to be of the same force and effect as the original Letters Patent or Deed of Grant, under the seal of the said Colony, duly recorded and signed by the Governor of the said Colony for the time being, and a copy of any such entry, or copy kept or hereafter to be kept, as of record as aforesaid, of any such Letters Patent or Deed of Grant, certified to be a true copy under the hand of the said Colonial Secretary, or the Registrar General, or Deputy Registrar for the time being, shall, upon proof made that such certificate has been signed by the said Colonial Secretary, or Registrar General, or Deputy Registrar for the time being (and whom it shall not be necessary to prove to be such Colonial Secretary, or Registrar General, or Deputy Registrar), shall have the same force and effect for the purposes of evidence, to all intents and purposes whatsoever, as if the original Letters Patent or Deeds of Grant, of which the copy so produced and certified shall purport to be a copy of the entry or copy as aforesaid, had been produced in evidence.

Official record of Deeds of Grant to be received in evidence—

and also duly-certified copies of such record.

Fees.

2. And be it enacted, That for every such copy a fee at the rate of one shilling and three-pence for every folio of seventy-two words shall be charged previously to the delivery of the same, and the amount thereof shall be duly paid by the officer receiving the same into the Colonial Treasury, for the public uses of the said Colony, and in support of the Government thereof.

ILLUSORY APPOINTMENTS.

11 G. IV & 1 W IV c. 46. An Act to alter and amend the Law relating to illusory Appointments. [16th July, 1830.] (*)

Illusory appointments shall be valid in equity as well as at law.

" WHEREAS by deeds, wills, and other instruments, powers are frequently given to appoint " real and personal property amongst several objects, in such manner that none of the " objects can be excluded by the donee of the power from a share of such property: " And whereas appointments in exercise of such powers, whereby an unsubstantial,

(*) Adopted by 5 W. IV No. 8, from 4th August, 1834.

"illusory, or nominal share of the property affected thereby is appointed to, or left unappointed to devolve upon any one or more of the objects thereof, are invalid in equity, although the like appointments are good and binding at law": Be it therefore enacted, by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, That no appointment which from and after the passing of this Act shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to, or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power.

2. Provided always, and be it further enacted, That nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any such power as aforesaid, which shall declare the amount of the share or shares from which no object of the power shall be excluded.

3. Provided also and be it further enacted and declared, That nothing in this Act contained shall be construed, deemed, or taken, at law or in equity, to give any other validity, force, or effect to any appointment, than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to or left unappointed to devolve upon any object of such power.

Not to affect any deed which declares the amount of the share

nor to give any other force to any appointment than the same would have had.

INFANTS' MARRIAGE SETTLEMENTS.

20 Vic. No. 2. An Act to enable Infants, with the approbation of the Supreme Court in its equitable jurisdiction, to make binding settlements of their real and personal estate on marriage. [29th December, 1856.]

WHEREAS great inconveniences and disadvantages arise in consequence of persons who marry during minority being incapable of making binding settlements of their property: For remedy whereof be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales, in this present Parliament assembled, as follows:—

1. From and after the passing of this Act, it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Supreme Court in its equitable jurisdiction, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said Court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: Provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant.

Infants may with the approbation of the Supreme Court make valid settlements or contracts for settlements of their real and personal estate upon marriage.

2. Provided always, That in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.

In case infant die under age, appointment, &c., to be void.

3. The sanction of the Supreme Court in its equitable jurisdiction to any such settlement or contract for a settlement may be given, upon petition presented by the infant or his or her guardian, in a summary way, without the institution of a suit, and if there be no guardian, the Court may require a guardian to be appointed or not as it shall think fit; and the Court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition.

The sanction of the Supreme Court to be given upon petition.

4. Provided always, that nothing in this Act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years.

Not to apply to males under 20 or females under 17 years of age.

5. The jurisdiction and powers by this Act vested in the Supreme Court may be exercised by the Primary Judge thereof in Equity, or one other Judge acting as such in his absence, or during his illness, in the same manner as the ordinary equitable jurisdiction and powers of the Supreme Court are now exercised, and subject in like manner to appeal, rehearing, and review.

Jurisdiction given to the Primary Judge in Equity or one other Judge in his absence or illness.

INHERITANCE.

INHERITANCE. (*)

3 & 4 W. IV c. 106. An Act for the amendment of the Law of Inheritance. [29th August, 1833.]

Meaning of words in the Act.

"Land."

"The purchaser."

"Descent."

"Descendants."
"Person last entitled."

"Assurance."

Number and gender.

Descent shall always be traced from the purchaser, but the last owner shall be considered to be the purchaser unless the contrary be proved.

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

Where heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

Brothers &c. shall trace descent through their parent.

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; that is to say,—The word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor, and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

2. And be it further enacted, That in every case descent shall be traced from the purchaser, and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this Act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.

3. And be it further enacted, That when any land shall have been devised, by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three (†), to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three (†), to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.

4. And be it further enacted, That when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three (†), or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three (†), then and in any such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land.

5. And be it further enacted, That no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

(*) Adopted by 7 Wm. IV No. 8, from 1st Jan., 1837. See also ss. 20 and 21 of the Trust Property Act, *post*.

(†) *i.e.*, in this Colony from 1st January, 1837. See sec. 2 of the adopting Act.

6. And be it further enacted, That every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue.

Lineal ancestor may be heir in preference to collateral persons claiming through him.

7. And be it further enacted and declared, That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants, shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed, and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

The male line to be preferred.

8. And be it further enacted and declared, That where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male paternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants.

The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

9. And be it further enacted, That any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

Half blood if on the part of a male ancestor to inherit after the whole blood of the same degree if on the part of a female ancestor after her.

10. And be it further enacted, That when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainer shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainer before the first day of January, one thousand eight hundred and thirty-four (*).

After the death of a person attainted his descendants may inherit.

11. And be it further enacted, That this Act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of January, one thousand eight hundred and thirty-four (*).

Act not to extend to any descent before January, 1834.

12. And be it further enacted, That where any assurance executed before the said first day of January, one thousand eight hundred and thirty-four (*), or the will of any person who shall die before the same first day of January, one thousand eight hundred and thirty-four (*), shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this Act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January, one thousand eight hundred and thirty-four (*).

Limitations made before the 1st January, 1834, to the heirs of a person then living shall take effect as if the Act had not been made.

INSOLVENCY.

5 Vic. No. 17. An Act for giving relief to Insolvent Persons, and providing for the due Collection, Administration, and Distribution of Insolvent Estates, within the Colony of New South Wales, and for the prevention of Frauds affecting the same. [29th December, 1841.]

WHEREAS it is expedient and necessary to make provision for giving relief to such persons as by misfortune, and without having been guilty of fraud or dishonesty, are, or may become, insolvent, and for the due collection, administration, and distribution of insolvent estates within the Colony of New South Wales, and for the prevention of frauds affecting the same: Be it therefore enacted, &c., &c.

Preamble.

3. And be it enacted, That from and after the first day of February next, it shall and may be lawful for any Judge of the Supreme Court of the said Colony, upon the petition, in writing, of any person, setting forth that he is insolvent, and desirous of surrendering his estate for the benefit of his creditors, either to direct such person to appear before

Any Judge may accept the surrender of the estate of any person by petition declaring himself insolvent

(*) i.e., in this Colony from 1st January, 1837. See section 2 of the Adopting Act.

him to be examined touching his said insolvency, or to receive such other proof thereof, by affidavits of the said insolvent and others, as to the said Judge may seem fit; or to direct such petitioner to appear before any such Commissioner as aforesaid, and to direct such Commissioner to examine the petitioner in manner aforesaid, and to take proof of the matters aforesaid; and it shall and may be lawful for any Judge of the said Supreme Court, on considering the report of any such Commissioner, or upon proof of the matters aforesaid, to his satisfaction, to accept the surrender of such estate, and by order under his hand, to place the same under sequestration in the hands of the Chief Commissioner in and for that part of the Colony in which such insolvent shall reside. ⁽¹⁶⁾

Surrender by persons vested with the administration of the estate of others.

4. And be it enacted, That it shall in like manner be lawful for any Judge of the said Supreme Court, upon the like petition of any person legally vested with the administration of the estate of any person deceased, or with the estate of any other person, situate in the said Colony, in trust for creditors,* stating the insolvency of such estate, or upon the like petition, stating the insolvency of the estate of any company, trading or having any estate or effects within the said Colony, made by the greater number of the partners of such company, who, at the time of presenting the petition, are within the said Colony, to examine the petitioner or petitioners, or cause him or them to be examined in manner aforesaid, or to take, or cause to be taken, proof of the matters aforesaid, in manner hereinbefore provided; and it shall be lawful for any Judge of the Supreme Court, upon proof of the matters aforesaid, to his satisfaction, to accept the surrender of any such estate, and to place the same under sequestration in manner aforesaid; and after the order for any such sequestration is made, the like proceedings shall and may be had and take place concerning such estates, and the persons in whom the administration thereof is legally vested, and the partner or partners of such companies, as are herein provided concerning other estates and other insolvents.

What shall be deemed acts of insolvency.

5. And be it enacted (†), That if any person having any property, personal or real, within the said Colony, shall depart therefrom, or being out of the said Colony, shall remain absent therefrom, or shall depart from his dwelling-house, or otherwise absent himself with intent to defeat or delay his creditors in obtaining payment of their debts; or having against him the sentence of any competent Court, being thereunto required, shall not satisfy the same, or shall not point out to the officer charged with the execution thereof, sufficient disposable property to satisfy the same, and if it shall appear from the return made by such officer, or his affidavit, that he has not found sufficient disposable property of such person to satisfy such sentence; or shall make, or cause to be made, either within the said Colony or elsewhere, any fraudulent alienation, transfer, gift, surrender, delivery, mortgage, or pledge, of any of his estate, goods, or effects, real or personal, or give or execute any fraudulent warrant of attorney, or *cognovit actionem*, whereby the same or any part thereof may be affected, shall be deemed thereby to have committed an act of insolvency.

What alienations, transfers, surrenders, &c., fraudulent and void.

6. And be it enacted (†), That every alienation, transfer, gift, surrender, or delivery, mortgage, or pledge, of any estate, goods, or effects, real or personal, or warrant of attorney, or *cognovit actionem* made by any person, who at the time is actually insolvent, or who, by any such alienation, transfer, gift, warrant of attorney, *cognovit actionem*, surrender, or delivery, shall be rendered insolvent, to any person whatsoever, without valuable consideration, shall be, and is hereby declared to be, fraudulent and absolutely void: Provided always, that no conveyance or assignment which shall have been executed prior to the passing of this Act, under the provisions of an Act of the said Governor and Council, passed during the present Session, intituled "*An Act for the further amendment of the law, and for the better advancement of Justice*," and in conformity with those provisions, shall be deemed fraudulent or void, within this or the next preceding section.

What alienations, transfers, surrenders, &c., liable to be set aside at the instance of a creditor injured thereby.

7. And be it enacted, That all alienations, transfers, gifts, surrenders, or deliveries, of any goods or effects, real⁽¹⁷⁾ or personal, made by any person after he has contracted any debt, and within twelve months preceding the commission of any act of insolvency by him, or preceding the sequestration of his estate as insolvent, or preceding any time at which it shall be made to appear by proof that he was actually insolvent, to any person whatsoever, without valuable consideration, shall be, and are hereby declared to be, liable to be set aside, on a summary application to, and by order of the Supreme Court, at the instance of any creditor of the said insolvent, whose debt was contracted, or the cause of whose debt had arisen prior to the making of such alienations, transfers, gifts, surrenders, or deliveries, in so far as such creditor would thereby be prevented from receiving the full amount of his said debt. ⁽¹⁸⁾

* See 5 Vic. No. 9, ss. 33 and 37, ante pp. 5 and 6.

† See 7 Vic. No. 19, s. 8, post p. 53.

⁽¹⁶⁾ By the sequestration of the "estate" of a partnership, the separate estate of each partner passes to the assignees. *Robey v. Mitchell*, S.C., November, 1849, followed and approved in *Haslingden v. Bate*, 1 S.C.R., App. 41, *Tutting's Insolvency*, March, 1856, and *Perry v. Towns*, 1, S.C.R., 73.

⁽¹⁷⁾ "Effects real" held in *Ex parte Bergin*, 3, S.C.R., p. 173, to include land.

⁽¹⁸⁾ B., the owner of an equitable estate for life in right of his wife, with about £4,000, on the 20th April, 1861, executed a conveyance and assignment of his estate and interest

8. And be it enacted, That all alienations, transfers, gifts, surrenders, deliveries, mortgages, or pledges, of any estate, goods, or effects, real or personal, warrants of attorney, *cognovits actionem*, and judgments entered up thereon, made by any person being insolvent, or in contemplation of surrendering his estate as insolvent, or knowing that legal proceedings for obtaining an order for the sequestration of his estate as insolvent, have been commenced, or within sixty days preceding the making of any order for sequestration of his estate as insolvent, and having the effect of preferring any then existing creditor to another, shall be, and are hereby declared to be, absolutely void. ⁽¹⁹⁾

What alienations, surrenders, &c., having the effect to prefer one creditor to another absolutely void.

to L. in consideration of £500, of which sum £360 were retained by L. in payment of a disbursed promissory note made by B. and held by L. On 16th of same month, B. was sued for a large sum, and a verdict was given against him for the amount claimed, whereupon he sequestrated his estate on the 1st June following. The suit was brought by B's Official Assignee, to set aside the conveyance to L. and a subsequent conveyance by L. and B's wife in favour of said wife. *Held*, that under ss. 6 & 7 of 5 Vic. No. 17, irrespective of the Statute of the 13th of Elizabeth, the deed was void as against B's creditors, the consideration not being for valuable consideration within the meaning of the Insolvency Act. *Sempill v. Lee*, 4, S.C.R., Eq., p. 90.

A settlement was executed within twelve months of the sequestration of his estate by the settlor, who had a life interest in four houses,—his eldest son having the remainder in fee. Settlor and son then conveyed the house to a trustee to raise money for repairs, and subject thereto in trust for settlor's wife for life, remainder to two younger children until twenty-one; remainder to the eldest son. No money had been raised for repairs, and the rents had been paid by the trustee to the wife. *Held*, that the settlement was not voluntary. *Ex parte Giblin and another*, 6, S.C.R., p. 260.

J.C., a trader, before his marriage with his second wife, executed a marriage settlement, conveying certain lands to trustees, to the use of himself and heirs until the marriage, and, after the solemnization thereof, to his own use for life—"or until he should become a bankrupt or insolvent, within the meaning of any law for the relief of, or relating to, insolvent debtors or bankrupts—or should attempt to alien or encumber the same, or any part thereof—or should do or suffer to be done anything whereby the same should, wholly or partially, by his act or default, or by operation of law or otherwise, if belonging absolutely to him, become vested in, or payable to, any other person; and, after his death, or the termination in his lifetime of the use declared in his favour by the happening of any of the events above mentioned, to the use of his trustees, upon certain trusts in favour of his wife for life, for her separate use." *Held*, that J.C., by making the assignment, did not become a bankrupt or insolvent "within the meaning of any law for the relief of, or relating to, insolvent debtors or bankrupts"; and that, under the circumstances, the provision in the deed of settlement relating to insolvency did not render the settlement void against the trustees of the assignment. *Wyld v. Caldwell*, 9, S.C.R., Eq., 62.

On a motion to set aside a deed under the 7th section of the Insolvent Act, it appeared that the deed was executed within twelve months before the sequestration of his estate by the insolvent, who was possessed of certain property in Sydney, and that the consideration purported to be a sum of money lent to the insolvent by his brother, the vendee, some three years before the execution of the deed. *Held*, that the deed was not given without valuable consideration, though it did not pass at the time. *Ex parte Hudson and another*, 11, S.C.R., 142.

On the 3rd and 6th of May, 1872, H., by two several indentures, conveyed to G., in consideration of £100, several parcels of land in which he had an interest in right of his wife, containing 1,465 acres, which were then subject to a mortgage for £200 and interest. On the 27th June, H. became insolvent, and his Official Assignee sought to have the indentures declared void as against his creditors, under the Act 5 Vic. No. 17, especially sections 6 and 7 thereof, on the grounds that the consideration was inadequate and did not belong to G. but to H. himself; that at the date of the execution of the said indentures H. was insolvent, or, if not, became insolvent by their execution, and that they were executed for the purpose of defeating his creditors. It appeared that, at the date of the conveyance, H. was only indebted to one creditor. The Primary Judge, under the circumstances appearing in evidence, declared the said indentures void as against the creditors of H., and ordered the defendant to pay the costs; but, on appeal, the full Court, on a review of the circumstances (Hargrave, P.J., *dissentiente*), reversed his Honor's decree, and dismissed the bill, but without costs. *Mackenzie v. Gough*, 12, S.C.R., Eq., 111.

⁽¹⁹⁾ A., within sixty days before the sequestration of his estate gave his father a mortgage on a certain leasehold, in the lease of which A. was named as lessee, but which his father had purchased with his own moneys, and had improved by the erection of buildings of the value mentioned as the consideration of the mortgage. No valuable consideration passed when the mortgage was executed. It was alleged that A., more than sixty days

Exception where any third party has purchased and acquired the goods or effects for a just price or in satisfaction of a debt.

9. Provided always and be it enacted, That if any person shall lawfully and *bond fide* purchase or acquire any of the estate, goods, or effects, real or personal, which have been alienated, transferred, given, surrendered, or delivered by any insolvent person, in the manner set forth in any of the three last preceding clauses of this Act, from any person to whom such estate, goods, or effects, have been so alienated, transferred, given, surrendered, or delivered, by any true bargain or agreement, for a just and competent price, or in satisfaction of any lawful debt due to him, nothing contained in this Act shall extend, or be construed to annul or affect any right which any such person has lawfully and *bond fide* purchased or acquired in such estate, goods, or effects; but in all such cases the persons to whom such estate, goods, or effects, were alienated, transferred, given, surrendered, or delivered, by the insolvent, shall be bound and obliged to pay the true value of all such estate, goods, and effects, by them disposed of to a third party, to or for behoof of such of the creditors of the insolvent as in virtue of the provisions of this Act, shall be entitled to have the alienations, transfers, gifts, surrenders, or deliveries of such estate, goods, or effects by the insolvent, declared to be void or set aside.

Alienation &c. after any order of sequestration void.

10. And be it enacted, That all warrants of attorney, and *cognovits actionem*, alienations, transfers, gifts, surrenders, deliveries, mortgages, or pledges of any estate, goods, or effects, real or personal, made by any person after any order of sequestration of his estate has been made, and before he shall have obtained his certificate as hereinafter mentioned, shall be and are hereby declared to be absolutely void.

What acquittances discharges of debts or security for same made by insolvent void.

11. And be it enacted, That all acquittances, surrenders, or discharges of any just debt, or of any security for any just debt, or other matter or thing, payment or delivery of which has not been actually and *bond fide* received, made by any person being insolvent, or in contemplation of surrendering his estate as insolvent, or knowing that legal proceedings for obtaining an order for sequestration of his estate as insolvent have been commenced, or after any such order has been made, or within sixty days preceding the making of any such order, having the effect to deprive his creditors of the benefit of any debt, or other matter or thing, shall be, and are hereby declared to be absolutely void.

What payments made by or to insolvent fraudulent and when valid.

12. And be it enacted, That all payments made to any creditor by any person not compelled by legal process to make the same, and knowing himself to be insolvent, or in contemplation of surrendering his estate as insolvent, or knowing that legal proceedings for obtaining an order of sequestration for his estate as insolvent have been commenced, or that any such order has been made, shall be, and are hereby declared to be fraudulent; but all payments really and *bond fide* made by any insolvent, or by any person on his behalf, to any creditor, before any order made for the sequestration of his estate is known to the insolvent or to such creditor, shall be valid; and all payments really and *bond fide* made to any insolvent, or to any person legally entitled to receive the same on his behalf, before any order is made for the sequestration of the estate of the insolvent, on his surrender thereof, or before sequestration of his estate has been adjudged, at the instance of his creditors, shall be valid, provided such person so making payment to the

before his insolvency, had agreed with his father to give him the mortgage, and that the mortgage deed was antedated so as to appear to have been executed as of the date of the agreement, at which time there was no proof of A. being in insolvent circumstances or contemplating insolvency. At the suit of the Official Assignee of A's estate, the Primary Judge set the deed aside as void under the Insolvent Act, 5 Vic. No. 17; and on appeal the decision was unanimously confirmed by the full Court. *Mackenzie v. Hollinshead*, 11, S.C.R., Eq., 83.

In proceedings under 12 Vic. No. 1, to set aside an equitable mortgage under 5 Vic. No. 17, s. 8, on the ground of the insolvency of the mortgagor at the time of executing the mortgage, the fact of the insolvency must be strictly proved. In a question whether the transaction impeached had been made *bond fide*, the mortgagee is entitled under the provisions of 12 Vic. No. 1 to strict proof of the insolvency. An affidavit of the Official Assignee deposing to that fact is not of itself sufficient. *Jones v. McKensie*, 13, Moore's P.C. Reports, p. 1.

In order to bring a case within this section there must be not merely a preference, but a fraudulent preference. *Bank of Australasia v. Harris*, 15, Moore's P.C.C., p. 97. See also *Harris and another v. Bank of Australasia*, 15, Moore's P.C.C., p. 116.

"Absolutely void" means "void as against creditors acting by their assignees for their common benefit, but not in the sense that a single creditor may defeat for a private advantage of his own in what the other creditors are not to participate." *Per Dickinson*, A. C. J. (overruling *Dick v. Kidd*, S. C., 13 July, 1857), affirmed by Privy Council on appeal, 8 February, 1862. *Bank of Australasia v. Harris*, 1, S. C. R., App., p. 12.

"Absolutely void" means "void at the election of the Official Assignee." *Broughton v. Barker*, 1, S. C. R., Eq., 78, following *Bank of Australasia v. Harris*, 1, S. C. R., App. p. 12, and *Young v. Billiter*, 30, L. J., Q. B. 153. See also *Mackenzie v. Barker*, 2 S. C. R., p. 56.

insolvent, or to any person on his behalf, had not at the time of such payment, notice of any order for the sequestration of the estate of the insolvent having been made, but if any person shall so receive any payment hereinbefore declared to be a fraudulent payment, from the insolvent, or if any person shall so make any payment to the insolvent, or to any person on his behalf, after an order for sequestration has been made, on the surrender of the insolvent, or after adjudication of sequestration, at the instance of the insolvent's creditors, or having at the time of such payment, notice of any order for such sequestration having been made at the instance of the insolvent's creditors, provided such sequestration shall thereafter be adjudged, in manner hereinafter mentioned, the person so receiving payment from the insolvent, shall be bound and obliged to repay, for the benefit of the creditors of the insolvent, the sum so received by him; and the person so making such payment to the insolvent, or on his behalf, shall be liable again to pay, for the benefit of the creditors of the insolvent, the sum so paid by him to the insolvent, or to any person on his behalf.

39. And be it enacted, That any creditor who shall have or hold any security or lien upon any part of the insolvent estate shall, when he is the petitioning creditor, be obliged upon oath in the affidavit accompanying the petition, and when he is not the petitioning creditor in the affidavit produced by him at the time of proving his debt, to put a value upon such security so far as his debt may thereby be covered, and to deduct such value from the debt proved by him, and to give his vote in all matters respecting the insolvent estate as creditor only for the balance, which balance shall be specified in his affidavit, without prejudice to such valuation being afterwards corrected, and without prejudice to the amount of the said debt in other respects; and in case any creditor shall hold any security or lien for payment of his debt obtained prior to the order for sequestration of the insolvent estate, and not liable to be set aside by virtue of this Act, upon any part of the said estate, the amount of value of such security or lien shall be deducted from his debt, and he shall only be ranked for, or receive payment of or a dividend for the balance after such deduction; and if any dispute shall arise about the value of such security the creditor or claimant shall, upon oath, put a value upon it, and the trustee or trustees shall then have an option, either of taking an assignment of the security for the benefit of the creditors at large on payment of the value so estimated out of the first assets of the insolvent estate, or of reserving the full effect of it to the creditor himself, and in either case the creditor shall be ranked on the divisible fund for the balance of his debt so ascertained together with the other creditors, such creditor being in no event entitled to draw more than full payment of the debt: Provided, however, that no creditor who shall hold any security or lien shall be entitled to any preference or advantage in respect thereof, or to reckon as a part of his debt covered thereby any debt which shall have arisen or accrued to him subsequent to the order for sequestration.. (20)

Proof by creditor holding pledge or lien.

41. And be it enacted, That no distress for rent shall be made, or levied, or proceeded in, after any order made for sequestration as aforesaid, but the landlord or party to whom the rent shall be due, shall be entitled to receive out of the assets of the estate, so much rent as shall be then due, not exceeding six months' rent in the whole, and shall be allowed to come in as a creditor, and share rateably with the other creditors, for the overplus.

Landlord to be entitled to six months' rent, &c.

42. And be it enacted, That it shall be lawful for the trustee or trustees to pay to any clerk or servant, six months' salary or wages in full, out of the insolvent estate, provided so much shall be actually and *bona fide* due at the time of the order for sequestration made.

Wages of clerks, &c.

53. And be it enacted, That every order made for placing any estate under sequestration as insolvent, shall, so soon as made, have the effect in law to divest the insolvent, and all persons administering the whole or any part of his estate for his use and behoof, and to vest in the Chief Commissioner, for the use and purposes of the sequestration, all the present and future estate, real and personal, and every right, title, and interest in and to any property, real or personal, wheresoever the same may be known or found, which shall

Effect of order for sequestration upon the estate of insolvent.

(20) A creditor who held a mortgage security over part of an insolvent estate for upwards of £624, valued his security only at £400, and proved for the balance as a creditor in distribution. After the plan of distribution was confirmed, and the creditor had received his dividend on his concurrent claim, the Official Assignee claimed an assignment of the security, and a conveyance of the premises, for the benefit of the creditors at large of the insolvent—upon payment of the £400, at which the security had been valued. The creditor thereupon claimed to put another value on the mortgaged premises. *Held* (Martin, C. J., *dissentiente*), that he could do so to the extent of the principal sum secured by the mortgage, and that the Official Assignee was not entitled, at the time he made the demand, to a conveyance and assignment of the premises, on payment of the £400—nor, after the premises had (by consent) been sold, was he presently entitled to the difference between the £400 and the principal sum. *Humphrey v. Jobb*, 13, S. C. R., Eq., 1.

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belong, or be due to, or vested in such insolvent at the date of making such order, or which may thereafter be purchased, or acquired by, or may revert, descend, or be devised, or come to the insolvent, while the insolvent estate shall remain under sequestration in the hands of the Chief Commissioner, together with all deeds, vouchers, papers, and writings, respecting the same; and after the said order for sequestration has been made, neither the insolvent, nor any person claiming through or under him, shall have the power to alienate, give, surrender, deliver, mortgage, pledge, or to recover, or to release or discharge the same, or any part thereof; neither shall the same be attached by any person, as the property of or belonging to the insolvent, so long as the said estate shall remain under sequestration.

Effect of order
for confirmation
of trustees.

54. And be it enacted, That every order made, as herein directed, for confirming any trustee or trustees, shall, so soon as made, have the effect in law to divest the Chief Commissioner, and to vest in such trustee or trustees, for the uses and purposes of the sequestration, and so long as such trustee or trustees shall continue to hold their office as aforesaid, all the present and future estate, real or personal, which shall have belonged, or been due to such insolvent, at the time when the order for placing his estate under sequestration was made, or which may thereafter be purchased, or acquired by, or may revert, descend, or be devised, or come to the insolvent, during the continuance of the sequestration, and before he shall obtain his certificate and allowance thereof, as herein-after provided, wheresoever the same may be found or known, together with all deeds, vouchers, papers, and writings respecting the same; and the said trustee or trustees shall have the like remedy to recover the said estate of the insolvent, or any part thereof, in his or their own name or names, for the purposes of the sequestration, as the insolvent himself might have had, if his estate had not been sequestrated; and all powers vested in any insolvent, at the time the order for placing his estate under sequestration was made, or which may thereafter become vested during the continuance of the sequestration, and before he shall obtain his certificate, and allowance thereof, which he might have legally executed for his benefit, shall and may, after the said order, and until an order be made for confirming the appointment of a trustee or trustees as aforesaid, be executed by the Chief Commissioner; and after such order is made for confirming such appointment, such powers may be executed by such trustee or trustees, for the benefit of the creditors, in such manner as the insolvent might have executed the same; and the said insolvent is hereby declared to be incapable to exercise or execute any such powers as aforesaid.

Effect of order
for confirmation
of new trustees.

58. And be it enacted, That whenever, on the death or removal of any trustee, any new trustee shall be elected and confirmed in manner hereinbefore provided, the order confirming the appointment of such new trustee, shall have the effect in law to vest in the new trustee, the whole insolvent estate, present or future, as hereinbefore particularly described; and every power, right, title, privilege, and remedy, vested in, or competent to, the former trustee, as trustee, before his death or removal, as fully and to the same extent, as the same was vested in the former trustee, by the order made for confirming his appointment, in manner aforesaid: Provided always, that the death or removal of any trustee shall not affect the validity or force of any lawful act done by him, as trustee, prior to his death or removal.

Employment by
trustees of
insolvent or
other person
about the estate.

64. And be it enacted, That it shall and may be lawful for the said trustee or trustees, if they shall see fit, to employ the insolvent, or any other person, in the gathering and preservation of any crops or produce, for any reasonable time necessary for the gathering and preservation thereof; and also to leave the said insolvent or to place any other person, in the charge of any property, manufactory, or concern belonging to the insolvent estate, until the same shall be sold, disposed of, or wound up, and to make to the said insolvent, or other person so employed, a reasonable allowance per diem for his labour.

As to offence of
knowingly
receiving any
fraudulent
alienation &c.
from insolvent.

74. And be it enacted, That if any person shall receive or accept any alienation, transfer, gift, surrender, delivery, mortgage, or pledge made by any insolvent, of any part of his estate, moneys, or securities for money, effects, or credits, with intent to defraud the creditors of the insolvent, knowing at the time the same to be fraudulently made, such person shall, on conviction thereof, suffer transportation for fifteen years, or for any period not less than five, or imprisonment, with or without hard labor, for any period not exceeding three years.

As to sale of
estate by trust-
tees, condition
of sale, &c.

79. And be it enacted, That the trustee or trustees, after being confirmed as aforesaid, shall, subject to the directions of the creditors, given in the manner hereinbefore provided, forthwith proceed to make sale of the property belonging to the said estate, real and personal, giving due notice thereof in the *Government Gazette*, and also such other notice as they shall think fit: Provided, that from the sale of the said personal property shall be excepted, until the creditors shall determine thereon, the wearing apparel, bedding, tools of trade, and household furniture, of the insolvent and his family.

Powers of trust-
tees in respect of
agreements
entered into by

84. And be it enacted, That if any insolvent shall have entered into any agreement for the purchase or exchange of any estate, or interest in any real property, it shall and may be lawful for the trustee or trustees of such insolvent, either to abide by, execute, and sue for, performance of such agreement, or abandon the same; and, if the said trustees shall not (upon being thereto required), elect whether they will abide by and execute such agree-

ment, or abandon the same, the vendor or person having made such agreement as aforesaid, or any one legally claiming under him, shall be entitled to apply to any Judge of the Supreme Court, who may thereupon order the said trustee to deliver up any such agreement, and the possession of the premises to the vendor or person so agreeing as aforesaid, or any one claiming under him, or may make such other order therein, as the said Judge shall think fit: Provided, that nothing herein contained shall prevent such vendor or person, having made such agreement as aforesaid, from suing the trustee or trustees, and recovering judgment against the insolvent estate, for any damage which he shall prove to have been by him sustained by the non-fulfilment, on the part of the insolvent, of any such agreement, or shall deprive the said trustee or trustees of their legal defence against such suit.

insolvent for purchase or exchange of real property.

85. And be it enacted, That any insolvent entitled to a lease or agreement for a lease, if the trustee or trustees accept the same, shall not be liable to pay rent accruing after the order of sequestration, or to be sued in respect of any non-observance or non-performance of any conditions, covenants, or agreements therein contained; and if the trustee or trustees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor or person agreeing to grant a lease, within fourteen days after he shall have had notice that the trustee or trustees shall have declined as aforesaid; and if the trustee or trustees shall not, upon being thereto required, elect either to accept or decline such lease, or agreement for a lease, the lessor or person so agreeing, as aforesaid, or any person entitled under such lessor, or person so agreeing, shall be entitled to apply to any Judge of the Supreme Court, who shall order the trustee or trustees to deliver up such lease or agreement, and possession of the premises, or may make such order therein as he shall think fit.

Insolvent entitled to lease or agreement for lease, when liable for rent or covenant, and remedy of lessor, &c., when trustees refuse to accept, &c.

97. And be it enacted, That every such certificate, when allowed by the Supreme Court, shall have the effect to discharge the insolvent from all debts due by him at the time his estate was surrendered, or adjudged to be sequestrated, and from all claims and demands proved, or hereby made proveable, against his estate; but no such certificate and allowance thereof shall have effect to release or discharge any person who was partner with such insolvent at the time of his insolvency, or who was then jointly bound, or who had made any joint contract with such insolvent. ⁽²¹⁾

Effect of certificate and allowance thereof.

107. And be it enacted, That in all suits or actions, and in all indictments or informations under this Act, where it shall be necessary to allege or prove that any party became or was insolvent, or that his estate was surrendered or sequestrated as insolvent, or ordered or adjudged to be so sequestrated, it shall be sufficient merely to allege that such party being insolvent within the meaning of this Act, his estate was ordered or adjudged to be sequestrated, without setting forth such adjudication, or any order for such sequestration, or setting forth or proving any petition presented in the matter of the insolvency, or any petitioning creditor's debt, or meeting of creditors, or other proceeding under this Act; and proof of such adjudication or order, by the production thereof, or of any office copy thereof, under the hand of the Judge or Officer signing the same, shall (on proof of such signature and of the identity of the party therein named as insolvent) be sufficient for the purposes of such allegation.

Proof of insolvency in any action or other proceeding.

108. And be it enacted, That this Act shall be in full force and effect on the first day of February next.

Commencement of Act.

109. [Local Acts 2 Vict. No. 14, and 4 Vict., No. 24, repealed.]

7 Vic. No. 19. An Act to amend an Act, intituled, "*An Act for giving relief to Insolvent Persons and providing for the administration of Insolvent Estates, and to abolish Imprisonment for Debt.*" [21st December, 1843.]

[Preamble—Partial repeal of 5 Vict. No. 17.]

8. And whereas by the fifth section of the said recited Act it is enacted, that the fraudulent alienation or transfer of any property shall constitute an Act of insolvency, and in the following section it is enacted, that every alienation or transfer of property, without valuable consideration, by any person at the time insolvent, or who thereby shall be rendered insolvent, shall be and the same is declared to be fraudulent and void; provided that no conveyance or assignment, executed prior to the passing of that Act, under the provisions of the Act, passed in the fifth year of the reign of Her present Majesty, intituled, "*An Act for the further amendment of the Law, and the better advancement of Justice*" (*), and in conformity with those provisions, should be deemed fraudulent or void, either under that or the preceding section; and whereas it is expedient to protect

Insolvent Act, ss. 5 and 6.

Advancement of Justice Act, ss. 33 and 34.

⁽²¹⁾ The release from sequestration of a joint estate, operates as a release of the separate estate of each partner. *Hazlingden v. Bate*, 1, S. C. R., App. 41, approving *Barrett v. Tooth*, S. C., Novr., 1848; and *Robey v. Mitchell*, S. C., Novr., 1849.

(*) *Ante*, p. 5.

Voluntary assignments provided for.

conveyances and assignments hereafter executed, in conformity with the provisions of the said last recited Act, and for that purpose to extend the operation of the said proviso: Be it therefore enacted, That after the passing of this Act, no conveyance or assignment which shall be made under, and executed in conformity with the provisions of the said Act for the better advancement of justice, shall be deemed fraudulent, within the intent or meaning of the said Act for the relief of insolvents, or shall be void under, or be in any manner affected by the said last-mentioned Act, or any part thereof; nor shall any person having executed any such conveyance or assignment, in conformity with the said provisions of the said Act for the further amendment of the law, and the better advancement of justice, be afterwards liable to be adjudged insolvent by reason thereof, or of his not pointing out, or not being able to point out, to the Sheriff or his officers, any property belonging to him, sufficient to satisfy any writ in the hands of such Sheriff, anything in the said Act passed for the relief of insolvents notwithstanding: Provided always, that it shall be lawful for one of the Judges of the Supreme Court, upon the petition of any number of creditors, whose debts shall amount to one-fifth of the whole amount of the debts of the said debtor, appearing on the said deed of assignment, to summon the said debtor before him, and cause him to be examined by the said creditors touching the state of his affairs previous and subsequent to making the said assignment, and all other matters relating to his estate and effects, as to the said Judge may seem fit; and that any such debtor refusing to answer any question which shall be put to him on such examination, or who shall answer evasively or unsatisfactorily, shall be liable to be committed to prison by the said Judge, until he shall answer such question in a full, fair, and satisfactory manner.

Liabilities of trustees under such deeds.

9. Provided always, and be it enacted, That every trustee appointed by, and having executed any such conveyance or assignment as aforesaid, shall be subject to the same liabilities, with respect to the keeping of accounts of all moneys and property coming to his hands, or being under his care or control in that capacity, and to the depositing of such moneys in some public Bank, and with respect to the withdrawing of the same therefrom, as the trustees of any insolvent person are by the said Act for the relief of insolvents, subject to in those cases; and it shall be lawful for the Supreme Court, or any Judge thereof, by rule or order in that behalf made (after rule or summons to show cause, as in any ordinary case), upon the complaint or application of any creditor, or of the debtor, or any other interested party, to require and compel any such trustee, if the Court or Judge shall see fit so to order, to make out and deliver to the person so applying, or to file, in the proper office of the Supreme Court, a full, true, and particular account, on oath, of all such moneys and property, and of the appropriation thereof, or if need be, to direct any such trustee to attend before the Master or Prothonotary of the Court, and submit himself to be examined touching the execution of his trust, and upon the coming in of the report upon any such examination, or on sufficient grounds shewn to such Court or Judge upon affidavit, without any such report or examination, or upon the resignation, absence from the Colony⁽²⁾, or death of any such trustee, to appoint a new trustee, in the place of any of the trustees originally appointed, and so from time to time as occasion may require; and to direct any trustee to pay over to any claimant or person, or into the hands of some officer of the Court, any sum of money alleged or proved, as the case may be, to be due to such claimant or person, either by such trustee, or the debtor for whose estate he shall have been appointed, or the amount of any balance appearing then to be in his hands, to the credit of such estate; and every such order to enforce, by attachment or execution, as in cases of the like nature; and the costs of every such proceeding, and rule, or order as aforesaid, shall be in the discretion of the Court or Judge making such rule or order.

Purchasers under voluntary assignments.

11. And for the protection of purchasers claiming under any such trustee as aforesaid: Be it enacted, That it shall not in any case be necessary, for any person purchasing any property, whether land or chattels, *bond fide*, and for valuable consideration, from the trustee or trustees appointed by, or otherwise lawfully acting for the time being, under any such conveyance or assignment as aforesaid, or advancing any money on the same, on loan, to inquire into the necessity or propriety of any such sale or loan; or to see to the application of the money paid or advanced; nor shall the title of such person be in anywise impeached or invalidated, by reason of any fraud or defect of which he shall have had no notice; provided that such conveyance or assignment shall have been duly advertised, and that, by reference to the schedule thereto, the creditors having executed the deed shall, at the time of such sale or loan, apparently constitute the majority in number and in value of the creditors named in or otherwise indicated by such schedule.

12. [Appointment of Official Assignees.]

13. [Elected Assignees.]

⁽²⁾ Trustees of an assigned estate having left the Colony, the Court held that it had jurisdiction, where it removes a trustee under sect. 9 of 7 Vict. No 19, to direct the outgoing trustees to execute all necessary conveyances to the new trustees, and order made accordingly. *In re the Assigned Estate of E. M. Sayers*, 2, S. C. B., p. 64.

14. And be it enacted, That every appointment so made of any official assignee as aforesaid, in and for any insolvent estate, shall, from the time of the making thereof, have the same effect in the law, of divesting from the insolvent or insolvents all his or their estate, (*) rights, and property of every kind, and of vesting the same in such assignee, and (in case of a previous appointment in the same estate) of divesting such estate, rights, and property, from the assignee previously appointed, and of vesting the same in his successor, as by the said recited Act, for the relief of insolvents, is (with respect to the vesting of an insolvent's estate in the Chief Commissioner) conferred on the Judge's order for placing the estate under sequestration: Provided that, upon the confirmation of any such elected assignee as aforesaid, all such estate, rights, and property as aforesaid, shall vest in the official assignee for the time being, jointly only with such elected assignee; and all and singular the powers, privileges, rights, duties, and liabilities, in all respects which, by the said Act, now attach or belong to, or devolve on, or which may lawfully be enjoyed or exercised by the trustees for the time being, of an insolvent estate, shall, after the passing of this Act, in like manner and to the same extent, attach and belong to, and devolve upon, and may be claimed, enjoyed, and exercised by, the assignees of every insolvent estate sequestrated after the passing of this Act (separately or jointly, as the case may be), whether official or elected.

Effect of appointment and election respectively.

15. And (for the better protection of purchasers and others) Be it enacted and declared, (*) That the same title to property, whether land or chattels, belonging to, or forming part of any insolvent estate, whether legal or equitable, and whether in possession or in reversion only, or expectancy, shall or may be conveyed or transferred, in fee or otherwise as the case may be, to any purchaser, mortgagee, or other person, by the assignee or assignees of such estate, for the time being, as the insolvent himself had, or was by law entitled or able to convey or transfer, immediately before the sequestration of the same estate; and it shall not be essential to the validity of any such conveyance or transfer, (so far as it respects the right of any person to execute the same as assignee,) to prove more than the fact of his appointment, or, in the case of an elected assignee, his confirmation in that character, that, at the time of the execution of the instrument, he had not been removed from office, and that there was then no assignee in or of the estate in question, other than the assignee or assignees executing the same, either official or elected, of which several facts, the certificate of the Chief Commissioner, endorsed on such instrument of transfer, shall be conclusive evidence.

Title conveyed by assignee.

16. And be it enacted, That after the passing of this Act, the certificate required by the said Act for the relief of insolvent persons, as a preliminary to the insolvent's discharge from his debts, shall not be necessary, nor shall any such certificate be given or applied for, but in lieu thereof, a certificate in the terms or to the effect hereinafter contained, shall be granted by the Chief Commissioner, either at Sydney or Melbourne, as the case may require, which, when allowed by the Court, as hereinafter mentioned, shall have in all respects the same effect, and be attended in other respects with the same consequences, as a certificate under the said recited Act for the relief of insolvent persons, when in like manner allowed, would have and be attended with, in case the present Act were not passed; and the Commissioner's said certificate shall be pleadable in like manner, and shall or may be revoked or made void for the same causes; and every contract or security made or given as a consideration, or with intent to induce any creditor to forbear opposition to the granting or allowance of any such certificate, shall be deemed fraudulent and absolutely void; and every such certificate shall be under the hand and seal of the Commissioner granting the same, and be to the effect that, in so far as appears to or is known by such Commissioner, the insolvent has in all things conformed himself to the provisions and requirements of the said Act for the relief of insolvent persons, and has not been guilty of any offence or misconduct, by reason whereof the granting of such certificate can lawfully, according to the present Act, be refused or suspended. (†)

Insolvent's certificate.

8 Vic. No. 15. An Act to amend the Act, passed in the fifth year of Her Majesty's Reign, for the relief of Insolvent Debtors, and also the Act lately passed for amending the same, and abolishing Imprisonment for Debt. [23rd December, 1844.]

WHEREAS an Act was passed by the Governor and Legislative Council of New South Wales, in the fifth year of the reign of Her present Majesty, intituled, "*An Act for giving relief to Insolvent Persons, and providing for the due collection, administration, and distribution of Insolvent Estates within the Colony of New South Wales, and for the prevention of frauds affecting the same*"; and whereas doubts have arisen as to the nature and duration of the estate and interest of the trustee or trustees of insolvent estates appointed and confirmed under the authority of the said Act, in the real and personal

Preamble.
5 Vic. No. 17.

(*) See 10 Vic. No. 14, *post*.

(†) The Act 17 Vic. No. 32 validated, both retrospectively and prospectively, all certificates issued to an insolvent by any Commissioner other than the Commissioner granting the same.

Orders made under said Act appointing or confirming trustees shall vest in them such estate or interest as insolvent had therein.

As to deeds executed by trustees.

estate of such insolvent, and as to the power of the said trustee or trustees to make and execute conveyances, assignments, and other assurances to purchasers and others of such estates; and whereas it is expedient that such doubts should be removed, and that full power should be given to such trustee or trustees to make valid conveyances, assignments, and assurances to purchasers and others of all property, whether real or personal, belonging to such insolvent estates: Be it therefore enacted and declared, by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, That every order made under and by virtue of the said Act, confirming the appointment of any trustee or trustees, shall for the uses and purposes of the sequestration, be deemed to have had, and shall have the effect in law of vesting in such trustee or trustees absolutely, or for such estate and interest as the insolvent had therein, all the real and personal estate of such insolvent which belonged or was due to such insolvent, or to which he was in any manner entitled at the time when the order for placing his estate under sequestration was made, and also all the real and personal estate, which since such last-mentioned order shall have been, or shall be purchased by, or which shall have reverted, descended, or come to, or shall revert, descend, or come to, the insolvent during the continuance of such sequestration, and before he shall have obtained his certificate and allowance thereof, as in the said Act or in the Act lately passed for amending the same is provided.

2. And be it enacted, That all deeds now executed, or which may hereafter be executed by any such trustee or trustees purporting to convey, assign, or assure any part of the real or personal estate and interest of an insolvent to any purchaser, mortgagee, or other person in fee simple, or for other less estate or interest, shall be, and be deemed to have been, from the time of the execution thereof, valid and effectual in the law, for conveying, assigning, and assuring such estate and interest to the purchaser, mortgagee, or other person, for such estate or interest.

10 Vic. No. 14. An Act to remove difficulties in the disposal, administration, and distribution of Insolvent Estates. [31st October, 1846.]

Preamble.

5 Vic. No. 17.

7 Vic. No. 19.

8 Vic. No. 15.

WHEREAS an Act was passed in the fifth year of the reign of Her present Majesty, intituled, "*An Act for giving relief to Insolvent Persons, and providing for the due collection, administration, and distribution of Insolvent Estates within the Colony of New South Wales, and for the prevention of frauds affecting the same*:" And whereas another Act was passed in the seventh year of the reign of Her present Majesty, intituled, "*An Act to amend an Act, intituled 'An Act for giving relief to Insolvent Persons, and providing for the administration of Insolvent Estates, and to abolish Imprisonment for Debt*:" And whereas another Act was passed in the eighth year of the reign of Her present Majesty, intituled, "*An Act to amend the Act passed in the fifth year of Her Majesty's reign, for the relief of Insolvent Debtors, and also the Act lately passed for amending the same, and abolishing Imprisonment for Debt*:" And whereas it is expedient for facilitating the sale and realization of the estates of insolvent persons by the assignees and trustees thereof, and for lessening the expense of conveyances on such sales, and for removing doubts as to the estate and interest conveyed by such assignees and trustees, and as to the powers possessed by such assignees and trustees, that the said recited Acts should be amended: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, That every order heretofore made or hereafter to be made by any Judge appointing any person to be official assignee of and for any estate placed, or to be placed, under sequestration, shall be deemed to have had, and after the passing of this Act shall have the effect of vesting in such official assignee absolutely, or for such estate and interest as the insolvent had therein, all the real and personal property of the insolvent which belonged to, was vested in, or was due to, such insolvent, or to which he was in any manner entitled at the time when the order for placing his or her estate under sequestration was made; and also all the real and personal estate which since such last-mentioned order hath been, shall have been, or shall be purchased by, or which hath or shall have reverted, descended, or come to, or which shall revert, descend, or come to the insolvent during the continuance of such sequestration, and before such insolvent hath or shall have obtained, or shall obtain, his or her certificate and allowance thereof, as in the said recited Acts is provided.

Order of Judge heretofore made or hereafter to be made shall have effect of vesting in official assignee the real and personal estate of an insolvent.

Order of Court confirming election of assignee shall divest official assignee and vest in said assignees jointly.

2. And be it enacted, That the order of the Court heretofore made, or hereafter to be made, confirming the election of any assignee heretofore elected, or hereafter to be elected, by the creditors of any insolvent estate, shall be deemed to have divested, and shall divest, the official assignee, and shall be deemed to have vested, and shall vest, in such official assignee jointly with such confirmed assignee as aforesaid, all the real and personal property of such insolvent, which shall so be deemed to have vested, or which shall vest, in such official assignee upon his appointment as aforesaid, and for such estate and interest; and that the order confirming the election of any such assignee as aforesaid, or any copy thereof, signed by the Chief Commissioner in and for all parts of the Colony, not comprehending the District of Port Phillip, and certified by such Commissioner to

be a copy thereof, shall be received and taken by all Courts of Justice in the said Colony as conclusive evidence that such assignee has been duly elected.

3. And be it enacted, That all deeds now executed, or which shall, after the passing of this Act be executed by the official assignee for the time being of any insolvent estate, or by the assignee for the time being elected by the creditors and confirmed by the Court as aforesaid, and by the official assignee for the time being, or by any trustees or a trustee for the time being, whose election has been confirmed, or by the trustees or trustee for the time being appointed provisionally, purporting to convey, assign, release, or assure any part of the real or personal property of an insolvent to any purchaser or purchasers, mortgagee or mortgagees, or other person or persons in fee simple, or for other less estate or interest, shall be, and be deemed to have been, from the time of the date of execution thereof, valid and effectual, both at law and in equity, for conveying, assigning, releasing, and assuring such real and personal property in fee simple, or for other or less estate and interest in such deed mentioned or expressed to be conveyed, assigned, released, or assured to the purchaser or purchasers, mortgagee or mortgagees, or other persons or person; and that such purchaser or purchasers, mortgagee or mortgagees, or other person or persons, and every person or persons claiming under him or them, shall be deemed to have been relieved, and shall after the passing of this Act be relieved from inquiring or ascertaining whether the advertisements have been, or shall have been inserted, and meetings of creditors called, or direction of creditors obtained, as in the said Acts provided, notwithstanding the same have not been, or shall not have been, or shall not be inserted, called, or obtained; and that any person who hath dealt or contracted with, or taken any conveyance or other assurance from any assignee or assignees for the time being, or trustee or trustees for the time being as aforesaid, of any insolvent estate, or shall deal or contract with, or take any conveyance or other assurance from any assignee or assignees, or trustee or trustees, for the time being as aforesaid of any insolvent estate, shall be deemed not to have been bound, and shall not be bound to inquire into or ascertain the power or authority of such assignee or assignees, or trustee or trustees for the time being as aforesaid, with respect to such dealing, contracting, conveyance, or assurance as aforesaid, but that such assignee or assignees, or trustee or trustees for the time being as aforesaid, shall for the purposes aforesaid, and as between him or them, and such person or persons as aforesaid, be deemed and considered to have been and shall be deemed and considered as beneficial owners of the real and personal property of the insolvent: Provided always, that nothing in this Act contained shall be construed to exonerate any such official assignee, confirmed trustee, or assignee for the time being as aforesaid, or trustee for the time being appointed provisionally as aforesaid, from any liability for the unobservance or nonperformance of his or their duty as such assignee or trustee as aforesaid.

Deeds executed by official or elected assignee to be deemed effectual to convey (*)—

and purchasers relieved from the effect of omissions—

but assignees not exonerated.

4. And be it enacted, That any mortgagee or mortgagees, or incumbrancer or incumbrancers, or any person or persons claiming by, from, through, or under him or them, who hath or have taken, or who shall take a release, conveyance, or other assurance of the equity of redemption, or other estate or interest of any official assignee for the time being, or official and confirmed assignees for the time being, or confirmed trustee or trustees for the time being, or trustee or trustees for the time being appointed provisionally, shall not thereby be deprived of any right or benefit which such mortgagee or mortgagees, or incumbrancer or incumbrancers, or such person or persons claiming by, from, through, or under him or them, would have had if such release, conveyance, or other assurance had not been made; and that any subsequent mortgagee or mortgagees, or incumbrancer or incumbrancers, or any person or persons claiming by, from, through, under, or in trust for him or them, shall not be entitled to enforce his or their mortgage or mortgages, or incumbrance or incumbrances, as against the mortgaged estate or prior mortgagee or mortgagees, or person or persons claiming, or to claim through him or them, without first giving full effect both at law and in equity, to the claim of such prior mortgagee or mortgagees, incumbrancer or incumbrancers, or person or persons claiming by, from, through, or under him or them, who hath taken or shall hereafter take a release, conveyance, or other assurance as aforesaid, to the full amount of his and their principal and interest, and other moneys in and by such prior mortgage or mortgages, incumbrance or incumbrances, expressed, or intended to be secured.

As to priority of rights of mortgagees.

5. And be it enacted, That any order of the Supreme Court aforesaid, whereby the estate of any insolvent shall be ordered to be released from sequestration, shall be deemed to have had and shall have the effect of re-vesting in the insolvent, all the real and personal property of the insolvent undisposed of, which by virtue of any of the said recited Acts or this Act, was vested or shall be vested in any assignee or assignees, trustee or trustees, of any insolvent estate, in the same manner as if his estate had never been placed under sequestration.

Order of Court shall have effect of re-vesting his estate in insolvent when released from sequestration.

6. And be it enacted, That the duly authorized agent of any creditor residing without the jurisdiction of the Supreme Court of the said Colony, shall have authority to do all acts, matters, and things authorized to be done by any creditor of an insolvent estate, under and by virtue of this Act, or of the said recited Acts, or any of them, as fully and effectually as such creditor could or might have done if personally present.

Agent of absent creditor to act as creditor could if present.

(*) See, however, 25 Vic. No. 8, sec. 7, *post*.

RIDER.

Court may suspend or grant certificate in certain cases.

And whereas by the secondly hereinbefore recited Act, the Chief Commissioner is authorized and directed in certain cases to refuse the insolvent his certificate: Be it enacted, That in all cases where, under the provisions of the said Act, the said Chief Commissioner, either at Sydney or Melbourne, shall have refused, or shall hereafter refuse, to grant the insolvent his certificate, and the decision of the Chief Commissioner shall have been confirmed on appeal by the Supreme Court, it shall be lawful for the said Supreme Court, on application to be made by the insolvent, and at the request of the majority in number of the creditors who shall have proved in his estate, from time to time to alter and to vary, the said decision, and to suspend the said certificate for such period as to the said Court shall seem reasonable and just, and then grant the same: Provided that no such application shall be made until after two years shall have elapsed from the date of such refusal by the Chief Commissioner.

25 Vic. No. 8. An Act to amend the Laws relating to Insolvency.
[26th December, 1861.]

Preamble.

WHEREAS it is expedient to amend the Law relating to Insolvency and the administration thereof, in manner hereinafter contained: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Certain payments before insolvency protected.

1. Every payment heretofore or hereafter made by any person before the sequestration of his estate under the Act fifth Victoria number seventeen to any creditor for or on account of any just debt due at the time of payment shall, except only in the cases hereinafter mentioned, be and be deemed to have been valid payment, anything in the said Act notwithstanding. ⁽²³⁾

Exceptions.

2. Provided that such creditor, or the person receiving payment on his behalf, shall not at the time of payment have known that the debtor was then insolvent, or was by such payment rendered insolvent, or that he then contemplated the surrender of his estate as insolvent, or that proceedings for causing his estate to be sequestrated had been commenced, or that the payment was a voluntary preference of such creditor to other creditors. And notice to the creditor or person so receiving payment of any such matter, by whomsoever given, if in accordance with the fact, shall be equivalent to and be deemed knowledge, in such creditor or person.

Retrospective operation of Act.

3. Provided also, that nothing in this Act shall extend to any suit or action already determined, or commenced before the first day of September, one thousand eight hundred and sixty-one, and pending at the passing of this Act, or shall affect any matter or question therein.

Transfer of certain jurisdiction to Chief Commissioner.

4. The Chief Commissioner of Insolvent Estates, sitting in Insolvency, shall have all the authority and powers of a Judge of a Court of Record, and the powers and jurisdiction now vested in and exercised by the Supreme Court or any Judge thereof, in or in respect of certain matters in Insolvency, that is to say,—the sequestration of estates, the release of estates from sequestration, the directing and prosecuting of the examinations of insolvents and witnesses, and ordering and enforcing the production of books and papers, the ordering of the payment of dividends and of other moneys belonging to insolvent estates, the ordering of payments by an insolvent becoming able to satisfy his creditors wholly or in part, the approval of accounts, and the confirmation of plans of distribution, shall be and the same are hereby transferred to and vested in the Chief Commissioner of Insolvent Estates: subject nevertheless to appeal to the Supreme Court, in such manner and upon such terms as the Judges by any General Rules made by them shall direct.

Certificates of insolvents need not be confirmed, &c., by Supreme Court.

5. It shall no longer be necessary that the granting, suspending, or refusing by the Chief Commissioner of a certificate to any insolvent shall be confirmed by the Supreme Court in the first instance; but every such grant, suspension, or refusal by the said Commissioner shall take effect from the date thereof, unless reversed or altered by the Supreme Court upon appeal; and every such appeal shall be within twenty-one days, and shall be subject to any General Rules made as aforesaid.

Power to disallow improper charges.

6. The Official Assignees in Insolvency shall be in all respects as such Assignees under the control and direction of the Chief Commissioner. And if at any time it shall appear to such Commissioner that any Official Assignee has improperly or unnecessarily incurred costs, charges, or expenses in any matter affecting an insolvent estate or its administration, he may disallow the same as against the estate, subject nevertheless to appeal to the Supreme Court by the Official Assignee or any other person interested in the question, in such manner and upon such terms as may be provided by any General Rules made as aforesaid.

⁽²³⁾ See *Mackenzie v. Barker* (Appeal from to Privy Council), 2, S.C.R., p. 68.

7. All sales in Insolvency, effected by or by the order of any Official Assignee, shall, unless the Commissioner shall in any case otherwise direct, be by public auction, of which six days public notice at the least shall be given. And no sale by private contract shall be complete until approved under the hand of the Chief Commissioner.

Sales in insolvency.

27 Vic. No. 4. An Act to render valid certain Orders of Sequestration in Insolvency. [18th December, 1863.]

WHEREAS certain orders and adjudications have been made by the Chief Commissioner of Insolvent Estates, whereby the estates of certain persons have been ordered to be placed under sequestration; and whereas doubts exist as to the validity of such orders and adjudications, by reason of the matters required to be proved to the satisfaction of the said Commissioner before the making of any such order or adjudication not having been so proved; and whereas it is expedient to declare such orders and adjudications to be valid: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Preamble.

1. All orders heretofore made by the Chief Commissioner whereby the estate of any person shall have been ordered to be placed under sequestration, and all adjudications by the said Commissioner whereby any such estate shall have been adjudged to be sequestrated, shall be deemed to have been lawfully made, although the matters required to be proved to the satisfaction of the said Commissioner, before the making of any such order or any such adjudication, shall not have been so proved.

Certain sequestrations without previous proof made valid.

31 Vic. No. 9. An Act to facilitate Proceedings in Insolvency. [12th December, 1867.]

WHEREAS it is expedient to remove the difficulties attending proceedings by certain Corporations and Joint Stock Companies for the compulsory sequestration of the estates of persons indebted to them, but unable or unwilling to satisfy such debts, or who shall otherwise commit any act of insolvency, and to facilitate the proof by Corporations and Joint Stock Companies of their debts against the estates of insolvent persons, and otherwise to facilitate proceedings in Insolvency: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Preamble.

1. The word "Company," in this Act, shall comprehend every partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners; and also every Assurance Company or association for the purpose of assurance or insurance on lives, or against any contingency involving the duration of human life, or against the risk of loss or damage by fire or by storm or other casualty, or against the risk of loss or damage to ships at sea or on voyage or to their cargoes, or for granting and purchasing annuities on lives, whether such companies, societies, or institutions shall be Joint Stock Companies, or Mutual Assurance Societies, or both; and also every partnership which, at its formation or by subsequent admission (except any admission subsequent on devolution or other act in law), shall consist of more than twenty-five members; and also every Company authorized by statute or letters patent to sue and be sued in the name of some officer or person; and also every Company incorporated by statute or charter.

Meaning of word "Company."

2. Wherever under any of the Acts relating to Insolvency, or under any rule or order made in pursuance thereof, any person is or shall be authorized or required to take any oath, make any affidavit, sign or present any petition for the sequestration of the estate of his debtor, or for any other purpose, or do any other act,—any person authorized to sue or be sued for and on behalf of any Company, or the manager or other officer, or the agent of any Company, may or shall take such oath, make such affidavit, present or sign such petition, or do any such other act, for and on behalf of such Company.

Agent of Company may petition and make affidavit on behalf of Company.

3. Where any creditor or person, who by any of the Acts relating to Insolvency is entitled to petition for the sequestration of the estate of any person who may have committed or shall hereafter commit an act of insolvency, shall be absent from the Colony, the agent or attorney of such creditor, or person who shall be authorized to receive and recover the debts, property, or effects of such absent creditor or person in this Colony, may sign and present the petition and make the affidavit of the truth of the debt, and the cause thereof, required by the said Acts in lieu of such creditor or person: Provided always, that the person whose estate is sought to be sequestrated shall have the same rights and remedies against any such agent, attorney, or person as he has under or by virtue of any Acts relating to Insolvency against the creditor or person in whose name or on whose behalf such proceeding shall be taken; and every such agent,

Agent of absent creditor may petition for sequestration and make affidavit.

attorney, or person shall be liable for the like costs, damages, and expenses as his principal would have been if acting personally in the matter; and all notices, summonses, orders, and other documents, for the service of which upon the creditor provision is made by any of the Acts relating to Insolvency, or any rule or order made in pursuance thereof, may be served upon such agent, attorney, or person; and such service shall have the same force and effect in all respects with regard to such absent creditor on whose behalf such proceedings may have been taken, as if the same had been duly served upon such creditor.

38 Vic. No. 1. An Act to expedite and lessen the expense of proceedings in Insolvency. [25th June, 1874.] (*)

Continuance
and exercise of
Insolvency Juris-
diction of
Supreme Court.

1. The Insolvency Jurisdiction of the Supreme Court or of a Judge thereof, shall continue to be exercised as a superior Court of Record of Law and Equity, and the orders in such jurisdiction shall have the same force as if they were judgments at law, or decrees in equity of the said Supreme Court, and such Insolvency Jurisdiction as conferred by the enactments specified in the Schedule hereto, and to the extent therein expressed, shall be exercised, for and on behalf of the Supreme Court or a Judge thereof, in the first instance by the Chief Commissioner of Insolvent Estates, subject to appeal as hereinafter provided: And such Chief Commissioner shall, for the purposes of such jurisdiction, and of this Act, have and may exercise, cumulatively with any powers now by law vested in him, all the powers and authority possessed and exercisable from time to time by the Supreme Court or a Judge thereof; and when sitting in Chambers such Chief Commissioner shall (in respect to matters cognizable by him in Chambers), have the same jurisdiction, powers, and authority, as if he were sitting in open Court: Provided nevertheless, that all appeals and applications in Insolvency to the Supreme Court, or to a Judge thereof, commenced, or in part heard, at the time of the commencement of this Act, shall be proceeded with and determined as if this Act had not been passed.

Proviso.

Appeal.

2. Any person aggrieved by any decision of a District Commissioner of Insolvent Estates may appeal therefrom to the Chief Commissioner; and it shall be lawful for such Chief Commissioner to alter, reverse, or confirm such decision, as if originally heard before him: Any order or decision made by the Chief Commissioner, whether in respect of a matter brought before him on appeal or not, shall be subject to an appeal to the Supreme Court (such Court for the purposes of this Act consisting of two or more Judges thereof), on such terms, and within such times, as may be now, or from time to time, provided by law or general rules of Court: And the said Supreme Court shall thereupon exercise the powers vested in it, as originally exercisable by law, as well as on appeal, and shall have all authorities of the Supreme Court relative to the trial of questions of fact by jury, issue, or otherwise.

Rules of Court.

3. The general rules of Court as to appeals in Insolvency to the Supreme Court, shall be and are hereby required to be made by the Judges of the Supreme Court or any three of them, and the other general rules of Court in Insolvency shall be made by any two Judges of the Supreme Court together with the Chief Commissioner of Insolvent Estates; and all such general rules, whether as to appeals or otherwise, shall be laid before both Houses of Parliament, within fourteen days if Parliament be then sitting, and if not then within fourteen days after the next meeting thereof; and if either of the said Houses shall, by resolution passed within twenty-eight days after such rules have been laid before the said Houses respectively, resolve that the whole or any part of such rules ought not to continue in force, in such case the whole or such part thereof as shall be included in such resolution shall from and after such resolution cease to be binding.

Power to award
costs.

4. The Supreme Court, or the Chief Commissioner, sitting in Court or Chambers, may in all matters before it or him respectively, whether original or on appeal, award, either out of the insolvent estate, or against any person or persons, such costs as shall be just.

Repeal.

5. The one hundred and fourth section of the Act fifth Victoria number seventeen, and the fourth and fifth sections of the Act twenty-second Victoria number fourteen, are hereby repealed.

Proceedings
during winding
up directed
under "Compan-
ies Act" to be
laid before Chief
Commissioner.

6. When under the provisions of the one hundred and thirty-third section of the "Companies Act," the Court (as in the said section defined) makes an order for winding up a Company, and directs that all subsequent proceedings for winding up the same be had and taken before the Chief Commissioner of Insolvent Estates, thereupon such Chief Commissioner shall, subject to appeal as in the said section provided, for the purposes of winding up such Company, be deemed to be "the Court" within the meaning of Part IV of that Act, and shall have for the purposes of such winding up all the powers of the Supreme Court in its Equitable Jurisdiction.

(*) Although this Act mainly concerns procedure, it has nevertheless been thought of such general practical utility that it is printed at length in this collection.

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7. If any person, having any right or privilege acquired under the second sub-section of section two hundred and forty-nine of the said Companies Act, should be entitled to and shall hereafter institute proceedings and prosecute matters under the eleventh Victoria number nineteen, the Chief Commissioner of Insolvent Estates shall, subject to appeal as in Insolvency, have and exercise the powers of the Supreme Court or a Judge thereof, cumulatively with the powers and duties vested in him by law, for the purpose of winding up and generally determining all such proceedings and matters under the said last-mentioned Act.

Power of proceedings instituted under Act 11 Vict. No. 19.

8. Every attorney and solicitor of the Supreme Court may appear and be heard in all matters and proceedings before the Chief Commissioner of Insolvent Estates in Court or Chambers, and before the Registrar in Insolvency, without being required to employ counsel: And if any person, not being such attorney or solicitor, shall practise in the insolvency jurisdiction of the said Court as attorney or solicitor, he shall be deemed guilty of a contempt of Court.

Attorney or solicitor may be heard.

9. This Act shall be styled and may be cited as the "Insolvency Laws Amendment Title. Act of 1874."

SCHEDULE.

No. of Act.	Title of Act.	The jurisdiction, powers, and authority conferred by—
5 Vic. No. 17.	An Act for giving relief to insolvent persons, and providing for the due collection administration and distribution of Insolvent Estates within the Colony of New South Wales, and for the prevention of frauds affecting the same.	All the unrepealed sections of the Act, except section 7.
7 Vic. No. 19.	An Act to amend an Act intituled " <i>An Act for giving relief to insolvent persons, and providing for the administration of Insolvent Estates, and to abolish imprisonment for debt.</i> "	The unrepealed sections, except proviso to 8th section, and sections 9, 10, 11, and 12 thereof.
8 Vic. No. 15.	An Act to amend an Act passed in the fifth year of Her Majesty's reign for the relief of insolvent debtors, and also the Act lately passed for amending the same and abolishing imprisonment for debt.	The unrepealed sections.
10 Vic. No. 14.	An Act to remove difficulties in the disposal, administration, and distribution of Insolvent Estates; and Rider thereto.	The whole Act.
11 Vic. No. 19.	An Act for facilitating the winding up of Joint Stock Companies, unable to meet their pecuniary engagements.	The whole Act.
17 Vic. No. 17.	An Act for the appropriation of unclaimed balances in Intestate and Insolvent Estates, and for other purpose therein mentioned.	The whole Act, except sections 1 and 6.
17 Vic. No. 32.	An Act to authorize the Chief Commissioner of Insolvent Estates to issue certificates to insolvents in certain cases.	The whole Act.
19 Vic. No. 33.	An Act to amend the Insolvent Law of New South Wales.	The whole Act.
20 Vic. No. 11.	An Act to provide for the deposit in the Colonial Treasury of moneys in charge of Officers of the Supreme Court.	The whole Act, so far as relates to Official Assignees.
20 Vic. No. 24.	An Act to amend so much of the Insolvent Acts now in force as relates to directions of creditors.	The whole Act.
25 Vic. No. 8...	An Act to amend the laws relating to Insolvency.	The whole Act.
31 Vic. No. 9...	An Act to facilitate proceedings in Insolvency.	The whole Act.

LAWS, IMPERIAL (APPLICATION OF).

LAWS, IMPERIAL (APPLICATION OF, TO COLONY.)

9 Geo. IV, c. 83 [25 July, 1828.]

Laws of England to be applied in the administration of justice.

24. Provided also, and be it further enacted, That all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith, or with any charter, or letters patent, or order in Council which may be issued in pursuance hereof), shall be applied in the administration of justice in the Courts of New South Wales and Van Dieman's Land respectively, so far as the same can be applied within the said Colonies; and as often as any doubt shall arise as to the application of any such laws or statutes in the said Colonies respectively, it shall be lawful for the Governors of the said Colonies respectively, by ordinances to be by them for that purpose made, to declare whether such laws or statutes shall be deemed to extend to such Colonies and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the said Colonies respectively as may be deemed expedient in that behalf: Provided always, that in the meantime, and before any such ordinances shall be actually made, it shall be the duty of the said Supreme Court, as often as any such doubts shall arise upon the trial of any information or action, or upon any other proceeding before them, to adjudge and decide as to the application of any such laws or statutes in the said Colonies respectively.

LEASES.

32 Hen. 8, c. 28. Lessees to enjoy the Farm against the Tenants in Tail. [1540.] ⁽²⁴⁾

Leases made by tenant in tail, or by him which is seised in the right of his wife, or church, &c.

BE it enacted, That all leases hereafter to be made of any manors, lands, tenements, or other hereditaments, by writing indented under seal, for term of years or for term of life, by any person or persons being of full age of twenty-one years, having any estate of inheritance either in fee-simple or in fee-tail, in their own right or in the right of their churches or wives, or jointly with their wives, of any estate of inheritance, made before the coverture or after, shall be good and effectual in the law against the lessors, their wives, heirs, and successors, and every of them, according to such estate as is comprised and specified in every such indenture of lease, in like manner and form as the same should have been if the lessors thereof, and every of them, at the time of the making of such leases, had been lawfully seised of the same lands, tenements, and hereditaments comprised in such indenture, of a good, perfect, and pure estate of fee-simple thereof, to their own only uses.

Special observations of leases to be made by tenants in tail, or of the wife's land.

2. Provided always, That this Act or anything contained shall not extend to any leases to be made of any manors, lands, tenements, or hereditaments being in the hands of any fermor or fermors by virtue of any old lease, unless the same old lease be expired, surrendered, or ended within one year next after the making of the said new lease; nor shall extend to any grant to be made of any reversion of any manors, lands, tenements, or hereditaments; or to any lease of manors, lands, tenements, or hereditaments, which have not most commonly been letten to ferm, or occupied by the fermors thereof by the space of twenty years next before such lease thereof made; nor to any lease to be made without impeachment of waste; nor to any lease to be made above the number of twenty-one years, or three lives at the most, from the day of making thereof; and that upon every such lease there be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should have come after the deaths of the lessors if no such lease had been thereof made, and to whom the reversion thereof shall appertain according to their estates and interests, so much yearly firm or rent, or more, as hath been most customably yielded or paid for the manors, land, tenements, or hereditaments so to be letten within twenty years next before such lease thereof made; and that every such person and persons to whom the reversion of such manors, lands, tenements, or hereditaments so to be letten shall appertain as is aforesaid, after the deaths of such lessors or their heirs, shall and may have such like remedy and advantage to all intents and purposes against the lessees thereof, their executors and assigns, as the same lessor should or might have had against the same lessees: so that if the lessor were seised of any special estate-tail of the same hereditaments at the time of such lease, that the issue or heir of that special estate shall have the reversion, rents, and services reserved upon such lease after the death of the said lessor, as the lessor himself might or ought to have had if he had lived.

Leases made by husband and wife of the wife's lands.

3. Provided always, That the wife be made party to every such lease which hereafter shall be made by her husband of any manors, lands, tenements, or hereditaments, being the inheritance of the wife; and that every such lease be made by indenture in the

⁽²⁴⁾ This statute is referred to as being in force in this Colony in *Sempill v. Rashleigh*, 4, S.C.B., p. 190.

name of the husband and his wife, and she to seal to the same; and that the ferm and rent be reserved to the husband and to the wife, and to the heirs of the wife according to her estate of inheritance in the same; and that the husband shall not in anywise aliene, discharge, grant, or give away the same rent reserved, or any part thereof, longer than during the coverture, without it be by fine levied by the said husband and wife; but that the same rent shall remain, descend, revert, or come, after the death of such husband, unto such person or persons and their heirs, in such manner and sort as the lands so leased should have done if no such lease had been thereof made.

4. Provided also, That this Act extend not to give any liberty or power to any person or persons to take any more fermes, leases, or takings of any manors, lands, tenements, or other hereditaments, than he or they should or might lawfully have done before the making of this Act; nor extend to give any liberty or power to any parson or vicar of any church or vicarage, for to make any lease or grant of any of their messuages, lands, tenements, tithes, profits, or hereditaments belonging to their churches or vicarages, otherwise,—or in any other manner than they should or might have done before the making of this Act, any thing contained in this Act to the contrary notwithstanding.

6. And moreover, for certain consideration be it enacted, That no fine, feoffment, or other act or acts hereafter to be made, suffered, or done by the husband only, of any manors, lands, tenements, or hereditaments, being the inheritance or freehold of his wife during the coverture between them, shall in anywise be or make any discontinuance thereof, or be prejudicial or hurtful to the said wife or to her heirs, or to such as shall have right, title, or interest to the same by the death of such wife or wives; but that the same wife and her heirs, and such other to whom such right shall appertain after her decease, shall and may then lawfully enter into all such manors, lands, tenements, and hereditaments according to their rights and titles therein,—any such fine, feoffment, or other act to the contrary notwithstanding, fines levied by the husband and wife (whereunto the said wife is party and privy) only except.

7. Provided furthermore, That this clause or Act extend not to give any liberty to any such wife, or to her heirs, for to avoid any lease hereafter to be made, of any the inheritance of the wife by her husband and her for term of one-and-twenty years or under, or any her inheritance for term of three lives at the uttermost, whereupon as much yearly rent or more is or shall be reserved and yearly payable during the same lease as was at any time therefor yielded or paid within twenty years next before the making of any such lease, according to the tenor of this present Act, anything therein contained to the contrary notwithstanding.

LEASES FACILITATION.

11 Vic. No. 28. An Act to facilitate the granting of Leases. [1st October, 1847.]

WHEREAS it is expedient to facilitate the leasing of lands and tenements: Be it enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, That whenever any party to any deed made according to the tenor and effect of the form set forth in the first Schedule to this Act, or whenever any party to any other deed which shall be expressed to be made in pursuance of this Act, shall employ in such deed respectively any of the forms of words contained in column I of the second Schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed as if such party had inserted in such deed the form of words contained in column II of the same Schedule, and distinguished by the same number as is annexed to the form of words employed by such party, but it shall not be necessary in any such deed to insert any such number.

2. That every such deed, unless any exception be specially made therein, shall be held and construed to include all out-houses, buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passages, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever, to the lands and tenements therein comprised belonging or in anywise appertaining.

3. That in taxing any bill for preparing and executing any deed under this Act, or which might be prepared under this Act, it shall be lawful for the proper taxing officer of the Supreme Court, and he is hereby required, in estimating the proper sum to be charged for such transaction, to consider, not the length of such deed, but only the skill and labour employed and responsibility incurred in the preparation thereof.

4. That any deed, or part of a deed, which shall fail to take effect by virtue of this Act, shall nevertheless be as valid and effectual, and shall bind the parties thereto, so far as the rules of Law and Equity will permit, as if this Act had not been made.

5. That in the construction, and for the purposes of this Act and the Schedules hereto annexed, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all tenements and hereditaments or any undivided part or share therein respectively; and every word importing the singular

Where the words of column I, of the second Schedule employed, the deed to have the same effect as if words of column II were inserted.

Deed to include all houses, &c.

Remuneration for deed under the Act not to be by length only.

Deed not taking effect by this Act to be valid.

Construction clause.

LEASES FACILITATION.

number only shall extend and be applied to several persons or things as well as one person or thing and the converse; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and the word "party" shall mean and include any body politic, or corporate, or collegiate, as well as an individual.

Schedules, &c.,
part of Act.

6. That the Schedules and the directions and forms therein contained shall be deemed and taken to be parts of this Act.

SCHEDULES REFERRED TO.

THE FIRST SCHEDULE.

THIS indenture made the _____ day of _____, one thousand eight hundred and forty _____ (or other year) in pursuance of an Act to facilitate the granting of leases between (*here insert the names of the parties, and recitals, if any*), witnesseth, that the said (*lessor*) or (*lessors*) doth or do demise unto the said (*lessee*) or (*lessees*), his (*or their*) heirs, or executors, administrators, and assigns, as the case may be, all, &c., (*parcels*) from the _____ day of _____, for the term of _____ thence ensuing, yielding and paying therefor, during the said term, the rent of (*state the rent and mode of payment*).
In witness whereof the said parties hereto have hereunto set their hands and seals.

THE SECOND SCHEDULE.

Directions as to the Forms in this Schedule.

1. Parties who use any of the forms in the first column in this Schedule may substitute for the words "lessee" or "lessor" any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.
2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in the forms in the first column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.
3. Such parties may fill up the blank spaces left in the forms 4 and 5, in the first column of this Schedule so employed by them, with any words or figures, and the words or figures so introduced shall be taken to be inserted in the corresponding blank spaces left in the forms embodied.
4. Such parties may introduce into, or annex to, any of the forms in the first column, any express addition to, exceptions from, or express qualifications thereof, respectively, and the like additions, exceptions, or qualifications shall be taken to be made from or in the corresponding forms in the second column.
5. Where the premises demised shall be of freehold tenure, the covenants 1 to 10 shall be taken to be made with, and the proviso 11 to apply to, the heirs and assigns of the lessor; and where the premises demised shall be of leasehold tenure, the covenants and proviso shall be taken to be made with and apply to the lessor, his executors, administrators, and assigns, unless otherwise stated.

Column 1.

1. That the said (*lessee*) covenants with the said (*lessor*) to pay rent;

2. And to pay taxes;

3. And to repair;

Column 2.

1. And the said lessee doth hereby, for himself his heirs, executors, administrators, and assigns, covenant with the said lessor, that he the said lessee, his executors, administrators, and assigns will, during the said term, pay unto the said lessor the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever.

2. And also will pay all taxes, rates, duties, and assessments whatsoever, now charged, or hereafter to be charged, upon the said demised premises, or upon the said lessor, on account thereof.

3. And also will during the said term, well and sufficiently repair, maintain, pave, empty, cleanse, amend, and keep the said demised premises, with the appurtenances, in good and substantial repair, together with all chimney-pieces, windows, doors, fastenings, water-closets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks and keys, and all other fixtures and things which at any time during the said term shall be erected and made, when, where, and so often as need shall be.

LEASES FACILTIATION.

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Column 1—continued.

4. And to paint outside every year ;

5. And to paint and paper inside every year ;

6. And to insure from fire in the joint names of the said (*lessor*) and the said (*lessee*) ;

7. And that the said (*lessor*) may enter and view state of repair, and that the said (*lessee*) will repair according to notice.

8. That the said (*lessee*) will not use premises as a shop ;

Column 2—continued.

4. And also that the said lessee, his executors, administrators, and assigns, will, in every year in the said term, paint all the outside wood-work and iron-work belonging to the said premises with two coats of proper oil-colours, in a workmanlike manner.

5. And also that the said (*lessee*), his executors, administrators, and assigns will, in every year, paint the inside wood, iron, and other works, now or usually painted, with two coats of proper oil-colours, in a workmanlike manner ; and also to re-paper, with paper of a quality as at present, such parts of the premises, as are now papered ; and also wash, stop, whiten, or colour such parts of the said premises as are now plastered.

6. And also that the said lessee, his executors, administrators, and assigns, will forthwith insure the said premises hereby demised to the full value thereof, in some respectable Insurance Office, in the joint names of the said lessor, his executors, administrators, and assigns and the said lessee, his executors, administrators, and assigns, and keep the same so insured during the said term ; and will, upon the request of the said lessor, or his agent, show the receipt for the last premium paid for such insurance for every current year ; and as often as the said premises hereby demised shall be burnt down or damaged by fire, all and every the sum or sums of money which shall be recovered or received by the said (*lessee*), his executors, administrators, or assigns, for or in respect of such insurance, shall be laid out and expended by him in building or repairing the said demised premises, or such parts thereof as shall be burnt down or damaged by fire as aforesaid.

7. And it is hereby agreed, that it shall be lawful for the said lessor and his agents, at all seasonable times during the said term, to enter the said demised premises, to take a schedule of the fixtures and things made and erected thereupon, and to examine the condition of the said premises ; and further, that all wants of reparation which upon such views shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators, and assigns will, within three calendar months next after every such notice, well and sufficiently repair and make good accordingly.

8. And also that the said lessee, his executors, administrators, and assigns, will not convert, use, or occupy the said premises, or any part thereof, into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose, or otherwise than as a private dwelling-house, without the consent in writing of the said lessor.

LEASES FACILITATION.

Column 1—*continued*.

9. And will not assign without leave ;

10. And that he will leave premises in good repair.

11. Proviso for re-entry by the said lessor on non-payment of rent or non-performance of covenants.

12. The said (*lessor*) covenants with the said (*lessee*) for quiet enjoyment.

Column 2—*continued*.

9. And also that the said (*lessee*) shall not, nor will, during the said term, assign, transfer, or set over, or otherwise by any act or deed procure the said premises, or any of them, to be assigned, transferred, or set over unto any person or persons whomsoever, without the consent in writing of the said (*lessor*), his executors, administrators, or assigns first had and obtained.

10. And further, that the said (*lessee*) will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised, with the appurtenances, together with all buildings, erections, and fixtures now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects, reasonable wear and tear and damage by fire only excepted.

11. Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or non-performance of any of the covenants and agreements herein contained on the part of the said lessee, his executors, administrators, and assigns,—then, and in either of such cases, it shall be lawful for the said lessor, at any time thereafter, into and upon the said demised premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, re-possess, and enjoy as of his or their former estate, anything hereinafter contained to the contrary notwithstanding.

12. And the lessor doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said lessee, his executors, administrators, and assigns, that he and they, paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said lessor, his executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him, them, or any of them.

LIMITATIONS (STATUTE OF).

See *Real Property Suits Limitation Act*.

MARRIAGE.

19 Vic. No. 30. An Act to amend and consolidate the laws affecting the Solemnization of Marriage. [30th November, 1855.]

Preamble.

WHEREAS it is expedient to amend and consolidate the laws relating to the Solemnization of Marriage in this Colony: Be it enacted by His Excellency the Governor of New South Wales, by and with the advice and consent of the Legislative Council thereof, as follows:—

Repeal of Acts.

1. This Act shall commence on the first day of March, one thousand eight hundred and fifty-six,—on and from which day the Acts of Council enumerated in the Schedule

hereto marked A shall be repealed, except as to marriages solemnized, and things lawfully done by virtue of any such Act, before that day.

2. No marriages shall be celebrated except by some minister of religion, ordinarily officiating as such, whose name, designation, and usual residence shall have been registered, and shall then continue registered, in the office of the Registrar General for marriages in Sydney.

By whom marriages to be celebrated.

3. Provided that, where the parties to be married shall, before the Registrar for Marriages of the district within which the intended wife ordinarily resides, sign a declaration in the form set forth in the Schedule to this Act marked B, the marriage may be celebrated between such parties by such District Registrar, in the form of words set forth in the Schedule hereto marked C, to be repeated and signed by the parties to such marriage, respectively.

Declaration of marriage before District Registrar.

4. No marriage shall be celebrated, until after a declaration (upon oath or solemn affirmation) shall have been made before some surrogate for licenses, or before the Minister or District Registrar celebrating the marriage, by each of the parties to be married, in the form set forth in the Schedule hereto marked D.

Banns or License.

5. Every marriage which shall be celebrated by any such Minister or Registrar as aforesaid, after oath or solemn affirmation so made, shall be a legal and valid marriage, to all intents and purposes; and no other marriage, except as hereinafter provided, shall be valid for any purpose.

Essentials for valid marriage.

6. Provided that no marriage in fact shall be avoided by reason only of the same having been celebrated by a person not being a Minister or ordinarily officiating Minister of Religion, if either of the parties to the marriage shall at the time *bona fide* have believed that he was such ordinarily officiating Minister.

Provision for certain special cases.

7. Every marriage shall be celebrated in the presence of two witnesses at least, who shall sign a certificate, which shall be also signed by the Minister or Registrar celebrating the marriage and by the parties thereto, and shall be legibly written (or partly written and partly printed) in the form contained in the Schedule hereto marked E; and such Minister or Registrar shall deliver a copy of such certificate, immediately after the marriage, signed by himself, to one of the parties to the marriage; and the said Minister shall, within one month thereafter, transmit the original certificate to the Registrar of the District within which such marriage was celebrated.

Witnesses and certificate.

8. Nothing in this Act shall extend to any marriage between parties of whom both shall be Quakers or Jews. A certificate of every such marriage shall nevertheless, within ten days next following, be transmitted to the Registrar of the District within which it was celebrated, by the person celebrating the marriage or by one of the parties thereto, stating the date and place of such marriage, and the name, designation, and usual residence of each of those parties.

Quakers and Jews.

9. Every marriage celebrated between parties being both Quakers or both Jews, shall be as legal and valid as if duly solemnized under the provisions of this Act,—if such marriage was, when celebrated, a valid marriage according to the usages of the Quakers or Jews, as the case may be.

Such marriages valid.

10. If either party to any intended marriage, not being a widower or widow, shall be under the age of twenty-one years, such marriage shall not take place without production to the Minister or Registrar about to celebrate the same of the written consent of the father of such party, if within the Colony; or if not within the Colony, then of a guardian appointed by the father; or if there be no such guardian in the Colony, then of the mother of such party if within the Colony; or where there is no such parent or guardian in the Colony, or he or she is incapable of duly consenting, by reason of distance, habitual intoxication, or mental incapacity, then the written consent of some Justice of the Peace appointed for that purpose as hereinafter mentioned: Provided that such Justice shall make inquiry on oath as to the facts and circumstances of the case, before giving such consent.

Consent in case of minority.

11. For the purposes mentioned in the foregoing section, the Judges of the Supreme Court shall appoint, from time to time, one or more Justice or Justices of the Peace in every Registrar's District, who shall, by virtue of such appointment, give consent in such cases as aforesaid; every such appointment to be notified by the said Judges in the *New South Wales Government Gazette*.

Judges to appoint persons to consent in certain cases.

12. When any marriage shall be celebrated, upon the production of any such written consent as aforesaid, a statement of the fact of such consent shall be indorsed on the certificate of such marriage, and on the copy thereof, signed respectively by the Minister or Registrar celebrating the same.

Consent to be indorsed on certificate.

13. No marriage shall be deemed to have been unduly celebrated, by reason only of any mere defect or error in the declaration made respecting the same, where the identity of the parties to the marriage shall not be in question.

Certain marriages made legal.

14. Every marriage celebrated in this Colony before the commencement of this Act, by any Minister of Religion or person ordinarily officiating as such, shall be, and be deemed to have been from the time of the celebration thereof, a perfectly legal and valid marriage (notwithstanding any non-compliance with forms, or other irregularity attending the celebration), to all intents and purposes.

Confirming all existing marriages.

MARRIAGE.

Certain marriages not made legal.

Registration proof of marriage.

15. Provided that nothing in the previous section, or in the fifth section of this Act, shall legalize any marriage declared or made (or which shall hereafter be declared or made) invalid by any competent Court or by Act of Council; nor any marriage where either party thereto had another wife or husband then living; nor any marriage which would have been or would be void but for those sections, by reason of relationship, kindred, or alliance, or of fraud or incapacity to contract marriage; nor any marriage where (the same being at the time of its celebration invalid) either of the parties thereto shall afterwards, and before the passing of this Act, have intermarried with some other person.

16. A copy of the registry of any marriage, in the office of the Registrar General, under his hand, shall be received as evidence, in all proceedings civil and criminal, of the fact of such marriage having been duly celebrated,—until the contrary be shown.

17. [Punishment for unlawful celebration of marriage.]
18. [Solemn affirmation. False statements deemed perjury.]
19. [Punishment for wilfully marrying minors.]
20. [Punishment for forging any consent, certificate, &c.]
21. [Non-registration of Ministers' name.]
22. [Penalty upon omission to transmit certificate of marriage.]

SCHEDULE A.

ACTS REPEALED.

6 Geo. IV No. 21.	Passed 1st November, 1825.
5 William IV No. 2.	" 4th July, 1834.
7 William IV No. 6.	" 5th August, 1836.
2 Vic. No. 13.	" 29th August, 1838.
3 Vic. No. 7.	" 5th September, 1839.
3 Vic. No. 23.	" 19th November, 1839.
4 Vic. No. 14.	" 23rd September, 1840.

SCHEDULE B.

FORM OF DECLARATION TO AUTHORIZE MARRIAGE BEFORE DISTRICT REGISTRAR.

WE, *Thomas Williams*, of (*usual place of residence and designation or employment*) and *Mary Edwards*, of (*usual place of residence and employment*), do hereby declare that we are desirous of being married, but that we conscientiously object to be married by a Minister of Religion [Or "but that there is no Minister of Religion accessible for the purpose of solemnizing our Marriage"].

Signed by the parties this _____ day }
of _____ 18 _____ before me— } (*Signatures.*)

SCHEDULE C.

FORM OF MARRIAGE BEFORE REGISTRAR.

I, *Thomas Williams*, of (*usual place of residence and designation or employment*) do hereby declare in the presence of A.B., Registrar of Marriages for the District of *Bathurst*, that I take *Mary Edwards*, of (*usual place of residence and designation or employment*), to be my lawful wife: And I, the said *Mary Edwards*, do declare that I take the said *Thomas Williams* to be my lawful husband.

(*Signatures.*)

SCHEDULE D.

DECLARATION BEFORE SURROGATE, DISTRICT REGISTRAR, OR MINISTER.

I, *Thomas Williams*, of (*usual place of residence and designation or employment*), being duly sworn, do, on my oath declare (*or if objecting to take an oath "do solemnly and sincerely declare and affirm"*), that I believe there is no impediment or lawful objection by reason of any kindred relationship or alliance, or any former marriage, or the want of consent of parents or guardians, or any other lawful cause, to my being married to (*Mary Edwards*), of (*usual place of residence and designation or employment*), daughter of (*James Edwards*), of (*usual or last place of residence and designation*).

(*Signature of Thomas Williams.*)

MARRIED WOMENS' REVERSIONARY INTERESTS. 69

And I, the said (*Mary Edwards*), do on my oath declare (or do solemnly and sincerely declare and affirm), that I believe there is no impediment or lawful objection by any such reason or other lawful cause as aforesaid to my being married to the said (*Thomas Williams*).

(*Signature of Mary Edwards.*)

Declared and sworn (or "*and affirmed*") by both }
the parties named this day of }
18 before me— }
(*Signature and Designation*)

SCHEDULE E.

CERTIFICATE OF MARRIAGE.

I (*name of Minister or Registrar*), being (*designation*), do hereby certify that I have this day at (*place*) duly celebrated marriage between (*name designation and residence of husband*) and (*name designation and residence of wife*) after declaration duly made as by law required.

Dated this day of 18

Signature of Minister or Registrar.
A.B.

Signatures of Parties to Marriage—
C.D.
E.F.

Signatures of Witnesses—G.H. I.K.

MARRIED WOMENS' REVERSIONARY INTERESTS IN PERSONALTY.

39 Vic. No. 25. An Act to enable Married Women to dispose of Reversionary Interests in Personal Estate. [10th March, 1876.]

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows:—

1. It shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument, (except such a settlement as hereinafter mentioned), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could if she were a *femme sole*, and also to release her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled, in possession, under any such instrument as aforesaid, save and except that no such disposition, release, or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will, or instrument by which she shall be restrained from alienating or affecting the same.

Married women may dispose of reversionary interest in personal estate.

2. Every deed to be executed by a married woman for any of the purposes of this Act, shall be acknowledged by her, and be otherwise perfected in the manner, in and by the Act seven Victoria number sixteen, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land.

How deeds to be acknowledged.

3. Provided always that the powers of disposition given to a married woman by this Act shall not interfere with any power which, independently of this Act, may be vested in, or limited, or reserved to her so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act, she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition.

Powers given not to interfere with other powers.

4. Provided always that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage.

Marriage settlement not to be interfered with.

MORTGAGES.

MORTGAGES.

7 Geo. II c. 20. An Act for the more easy Redemption and Foreclosure of Mortgages. [1733.]

[See this Act in Chitty's collection, sub. title "Mortgages." Its short effect is to give jurisdiction to Courts of Law (similar to that exercisable in a Court of Equity) where there has been payment or tender, by the mortgagor, of principal, interest, and costs, viz., to consider such payment as a discharge of the mortgage, and to compel mortgagees to re-assign and deliver the mortgage securities to mortgagor.]

MORTGAGES (CLANDESTINE).

4 William and Mary, c. 16. An Act to prevent frauds by Clandestine Mortgages. [1692.]

WHEREAS great frauds and deceits are too often practised by necessitous and evil-disposed persons in borrowing of money, and giving judgments, statutes, and recognizances privately for securing the repayment of the said money, and the same persons do afterwards borrow money upon security of their lands of other persons, and do not acquaint the latter lender thereof with the same, whereby such late lender is very often in danger to lose his whole money, or forced to pay off the debts secured by the late judgments, statutes, and recognizances, before they can have any benefit of the said mortgages: And whereas divers persons do mortgage their lands more than once, without giving notice of their first mortgage, whereby lenders of money upon second or after mortgage, do often lose their moneys and are put to great charges in suits and otherwise: For remedy whereof, and preventing the same as much as may be for the future,—

Debtor upon judgment, &c., taking up money of another upon a mortgage, without notice of the judgment to the mortgagee, shall lose his equity to redeem.

2. Be it enacted by the King's and Queen's most excellent Majesties, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, That if any person or persons, from and after the first day of May, one thousand six hundred and ninety-three, shall borrow any money, or for any other valuable consideration for the payment thereof, voluntarily give, acknowledge, permit, or suffer to be entered, against him or them, one or more judgment or judgments, statute or statutes, recognizance or recognizances, to any person or persons, creditor or creditors; and if the said borrower or borrowers, debtor or debtors, shall afterwards take up or borrow any other sum or sums of money of any other person or persons, or for other valuable consideration become indebted to such person or persons, and for securing the repayment or discharge thereof shall mortgage his, her, or their lands or tenements, or any part thereof, to the said second or other lender or lenders of the said money creditor or creditors, and shall not give notice to the said mortgagee or mortgagees of the said judgment or judgments, statute or statutes, recognizance or recognizances, in writing under his, her, or their hand or hands, before the execution of the said mortgage or mortgages; unless such mortgagor or mortgagors, his, her, or their heirs, upon notice to him, her, or them given by the mortgagee or mortgagees of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns, in writing under his, her, or their hands and seals, attested by two or more sufficient witnesses, of any such former judgment or judgments, statute or statutes, recognizance or recognizances, shall, within six months, pay off and discharge the said judgment or judgments, statute or statutes, recognizance or recognizances, and all interest and charges due thereupon, and cause or procure the same to be vacated or discharged by record; that then the mortgagor or mortgagors of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns, shall have no benefit or remedy against the said mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, or any of them, in equity or elsewhere, for redemption of the said lands and tenements or any part thereof; but the said mortgagee or mortgagees, his, her, or their heirs, executors, administrators, and assigns, shall and may hold and enjoy the said lands and tenements, for such estate and term therein as were or was granted to the said mortgagee or mortgagees, against the said mortgagor or mortgagors, and all person and persons lawfully claiming from, by, or under him, her, or them, freed from equity of redemption, and as fully to all intents and purposes whatsoever as if the same had been purchased absolutely and without any power of liberty of redemption.

Person mortgaging twice without notice of the first mortgage loses his equity.

3. And be it further enacted, by the authority aforesaid, That if any person or persons who hath once mortgaged, or, from and after the said first day of May, shall mortgage any lands or tenements to any person or persons, for security of money lent or otherwise accrued or become due, or for other valuable considerations; and if the said mortgagor or mortgagors shall again mortgage the same lands or tenements, or any part thereof, to any other person or persons for valuable considerations (the said former mortgage

being in force and not discharged), and shall not discover to the said second or other mortgagee or mortgagees, or some or one of them, the former mortgage or mortgages, in writing under his or their hands, that then,—and in those cases also, the said mortgager or mortgagers, his, her, or their heirs, executors, administrators, or assigns, shall have no relief or equity of redemption against the said second or after mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, upon the said after mortgage or mortgages; but that such mortgagee or mortgagees, his, her, or their heirs, executors, administrators, and assigns, shall and may hold and enjoy such more than once mortgaged lands and tenements, for such estate and term therein as were or was granted and conveyed by the said mortgager or mortgagers, against him, her, or them, his, her, or their heirs, executors, or administrators respectively, freed from equity of redemption, and as fully to all intents and purposes as if the same had been an absolute purchase, and without any power or liberty of redemption.

4. Provided always, and be it further enacted by the authority aforesaid, That nevertheless, if it so happen, there be more than one mortgage at the same time made by any person or persons to any person or persons, of the same lands and tenements, the several late or under mortgagees, his, her, or their heirs, executors, administrators, or assigns, shall have power to redeem any former mortgage or mortgages upon payment of the principal debt, interest, and costs of suit to the prior mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns—anything herein contained to the contrary thereof in anywise notwithstanding.

5. Provided always, That nothing in this act contained shall be construed, deemed, or extended to bar any widow of any mortgager of lands or tenements from her dower and right in or to the said lands, who did not legally join with her husband in such mortgage, or otherwise lawfully bar or exclude herself from such dower or right.

Under mortgagees may redeem.

Dower saved.

OATHS ABOLITION.

9 Vic. No. 9. An Act for the more effectual abolition of Oaths and Affirmations taken and made in various Departments of the Government of New South Wales, and to substitute Declarations in lieu thereof, and for the suppression of voluntary and extra-judicial Oaths and Affidavits. [27th October, 1845.]

WHEREAS an Act of the Imperial Parliament was passed in the fifth and sixth years of the reign of His late Majesty King William the Fourth, whereby declarations are substituted for oaths in certain public departments of the State, and other provisions are therein made for the abolition of unnecessary oaths, and it is deemed expedient that provisions of a similar nature should be made for substituting declarations for oaths in the various departments of the Colonial Government of New South Wales: Be it therefore enacted, by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, That in any case where by any statute, law, or ordinance made or to be made, relating to any of the public Revenue of the Colony or any of the public offices or public departments, or by any official regulation in any department, any oath, solemn affirmation, or affidavit, might but for the passing of this Act be required to be taken or made by any person on the doing of any act, matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose whatsoever,—it shall be lawful for the Governor and Executive Council of the said Colony, if they shall so think fit, to substitute a declaration to the same effect as the oath, solemn affirmation, or affidavit which might but for the passing of this Act be required to be taken or made; and the person who might, under the Act or Acts imposing the same, be required to take or make such oath, solemn affirmation, or affidavit, shall, in the presence of the officer or person empowered by such Act or Acts to administer such oath, solemn affirmation, or affidavit, make and subscribe such declaration; and every such officer or person is hereby empowered and required to administer the same accordingly.

Preamble
5 and 6 William
IV ch. 62.

Declarations substituted for oaths and affirmations.

2. And be it enacted, That when the Governor and Executive Council shall, in any such case as aforesaid, have substituted a declaration in lieu of an oath, solemn affirmation, or affidavit, the same shall be notified in the *New South Wales Government Gazette*, and from and after the expiration of twenty-one days next following the day of the date of the *Government Gazette* wherein such notification shall have been first published, the provisions of this Act shall extend and apply to each and every case, office, or department specified in such notification.

Such substitution to be notified in *Gazette*.

3. And be it enacted, That after the expiration of the said twenty-one days it shall not be lawful for any officer or other person to administer or cause to be administered, or receive or cause to be received, any oath, solemn affirmation, or affidavit in lieu of which such declaration as aforesaid shall have been directed by the said Governor and Executive Council to be substituted.

Oaths or affirmations not to be made or taken there-after.

OATHS ABOLITION.

Persons making false declaration guilty of misdemeanor.

Act not to extend to oath of allegiance.

Nor to oaths in judicial proceeding.

Abolition of extra-judicial oaths.

Proviso.

Wills may be verified on declaration.

Declaration in cases not specially provided for.

Fees payable.

Form of declaration.

False declaration.

4. And be it enacted, That if any person shall make and subscribe any such declaration as hereinbefore mentioned, in lieu of any oath, solemn affirmation, or affidavit by any Act or Acts relating to the public revenue as aforesaid required to be made, on the doing of any act, matter, or thing, or for verifying any book, account, entry, or return, or for any purpose whatsoever, and shall wilfully make therein any false statement as to any material particular, the person making the same shall be deemed guilty of a misdemeanor.

5. Provided always and be it enacted, That nothing in this Act contained shall extend or apply to the oath of allegiance in any case in which the same now is or may be required to be taken by any person who may be appointed to any office, but that such oath of allegiance shall continue to be required, and shall be administered and taken as well and in the same manner as if this Act had not been passed.

6. Provided also and be it enacted, That nothing in this Act contained shall extend or apply to any oath, solemn affirmation, or affidavit which now is or hereafter may be made or taken, or be required to be made or taken, in any judicial proceeding in any Court of Justice, or in any proceeding for or by way of summary conviction before any Justice or Justices of the Peace; but all such oaths, affirmations, and affidavits, shall continue to be required, and to be administered, taken, and made, as well and in the same manner as if this Act had not been passed.

7. And whereas a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the Justice of the Peace or other person by whom such oaths or affidavits have been administered or received, and whereas doubts have arisen whether or not such proceeding is illegal,—For the more effectual suppression of such practice and removing such doubts, be it enacted, That from and after the commencement of this Act, it shall not be lawful for any Justice of the Peace or other person to administer or cause or allow to be received any oath, solemn affirmation, or affidavit touching any matter or thing, whereof such Justice or other person hath not jurisdiction or cognizance by some Statute, Act, or ordinance in force at the time being: Provided always, that nothing herein contained shall be construed to extend to any oath, solemn affirmation, or affidavit before any Justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any inquiry held before any Justice of the Peace in the nature of Coroners' Inquests respecting sudden deaths, or touching any proceedings before the Legislative Council, or any Committee thereof, nor to any oath, solemn affirmation, or affidavit, which may be required by the laws of any foreign or other country out of New South Wales, to give validity to instruments in writing designed to be used in foreign or other countries respectively.

8. And be it enacted, That it shall and may be lawful to and for any attesting witness to the execution of any will or codicil, deed, or instrument in writing, and to and for any other competent person, to verify and prove the signing, sealing, publication, or delivery of any such will, codicil, deed, or instrument in writing, by such declaration in writing made as aforesaid, and every such Justice, Notary, or other officer shall be, and is hereby authorized and empowered to administer or receive such declaration.

9. And whereas it may be necessary and proper in many cases not herein specified, to require confirmation of written instruments or allegations, or proof of debts, or of the execution of deeds or other matters: Be it therefore enacted, That it shall and may be lawful for any Justice of the Peace, Notary Public, or other officer now by law authorized to administer an oath, to take and receive the declaration of any person voluntarily making the same before him, in the form of the Schedule to this Act annexed, and if any declaration so made shall be false or untrue, in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor.

10. And be it enacted, That whenever any declaration shall be made and subscribed by any person or persons under or in pursuance of the provisions of this Act or any of them, all and every such fees or fee as would have been due and payable on the taking or making any legal oath, solemn affirmation, or affidavit, shall be in like manner due and payable upon making and subscribing such declaration.

11. And be it enacted, That in all cases where a declaration in lieu of an oath shall have been substituted by this Act, or by virtue of any power or authority hereby given, or where a declaration is directed or authorized to be made and subscribed under the authority of this Act, or of any power hereby given, although the same be not substituted in lieu of an oath heretofore legally taken, such declaration, unless otherwise directed by the powers hereby given, shall be in the form prescribed in the Schedule hereunto annexed.

12. And be it enacted, That in any case where a declaration is substituted for an oath under the authority of this Act, or by virtue of any power or authority hereby given, or is directed and authorized to be made and subscribed under the authority of this Act, or by virtue of any power hereby given, any person who shall wilfully and corruptly make and subscribe any such declaration, knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor.

POSTHUMOUS CHILDREN.

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SCHEDULE REFERRED TO BY THE FOREGOING ACT.

I A.B. do solemnly and sincerely declare, that
And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the ninth year of the reign of Her present Majesty, intitled, "*An Act for the more effectual abolition of Oaths and Affirmations taken and made in various Departments of the Government of New South Wales, and to substitute Declarations in lieu thereof, and for the suppression of voluntary and extra-judicial Oaths and Affidavits.*"

PARTITION.

31 Henry 8, cap. 1. For Joint Tenants and Tenants in Common. [1539.]

1. [Preamble, &c.]

2. Be it enacted, &c., That all joint tenants and tenants in common that now be or hereafter shall be, of any estate or estates of inheritance, in their own rights or in the right of their wives, of any manors, lands, tenements, or hereditaments within this realm of England, Wales, or the Marches of the same, shall and may be coacted and compelled by virtue of this present Act to make partition between them of all such manors, lands, tenements, and hereditaments as they now hold or hereafter shall hold, as joint tenants, or tenants in common, by writ *de participatione faciendâ*, in that case to be devised in the King our Sovereign Lord's Court of Chancery, in like manner and form as coparceners by the common laws of this realm have been and are compellable to do, and the same writ to be pursued at the Common Law.

3. Provided alway, and be it enacted, That every of the said joint tenants or tenants in common, and their heirs, after such partition made, shall and may have aid of the other of their heirs, to the intent to dereign the warranty paramount, and to recover for the rate, as is used between coparceners after partition made by the order of the common law,—anything in this Act contained to the contrary notwithstanding.

32 Henry 8, cap. 32. Joint Tenants for term of Life or Years. [1540.]

Preamble, &c. Be it enacted, &c., That all joint tenants and tenants in common, and every of them, which now hold or hereafter shall hold, jointly or in common, for term of life, year or years, or joint tenants or tenants in common, where one or some of them have or shall have estate or estates of inheritance or freehold in any manors, lands, tenements, or hereditaments, shall and may be compellable from henceforth, by writ of partition to be pursued out of the King's Court of Chancery upon his or their case or cases, to make severance and partition of all such manors, lands, tenements, and hereditaments which they hold jointly and in common for term of life or lives, year or years, where one or some of them hold jointly or in common for term of life or years with other, or that have an estate or estates of inheritance of freehold.

II. Provided alway and be it enacted, That no such partition or severance hereafter to be made by force of this Act be, nor shall be prejudicial or hurtful to any person or persons, their heirs or successors, other than such which be parties unto the said partition, their executors or assigns.

POSTHUMOUS CHILDREN.

10 and 11 Wm. III c. 16. An Act to enable Posthumous Children to take Estates as if born in their Father's lifetime. [1699.]

Note.—This Act appears to have been omitted from Chitty's collection. The short effect of the Act, which was passed to get rid of the doctrine that no estate in remainder could vest in a son (under a settlement where a particular estate stood limited to the father) unless such son were born in the lifetime of the father, is, that posthumous children, under the limitations contained in marriage or other settlements (and which have been decided to be also included under the Act), shall take estates as if born in their father's lifetime, although there be no limitation to trustees to preserve contingent remainders.

POWERS OF ATTORNEY.

POWERS OF ATTORNEY.

17 Vic. No. 22. An Act to give greater effect to Powers of Attorney.
[26th September, 1853.]

Preamble.

WHEREAS difficulties frequently arise as to titles to land and other property, by reason of conveyances or other instruments and acts affecting the same having been executed and done under Powers of Attorney from absent persons, of whom it cannot be known whether they are alive, or whether they may not have revoked such Powers of Attorney, at the date of the execution of such conveyances or other instruments: Be it therefore enacted by His Excellency the Governor of New South Wales, by and with the advice and consent of the Legislative Council thereof, as follows:—

Conveyances, &c., under certain Powers of Attorney, executed after death or revocation and before notice thereof, to be valid.

1. Whenever the person who may have executed, or shall hereafter execute any Power of Attorney, (whether such person were or be at the time within the Colony or not) shall have declared or shall declare therein, that such power shall continue in force until notice of his death or of the revocation of such power shall have been received by the attorneys named therein, then and in every such case, such power shall operate accordingly; and every act hereafter done, performed, or submitted to by the said attorneys within the scope of the powers and authority conferred upon them, after such death or revocation as aforesaid, and before notice thereof shall have been received, shall be as effectual, in all respects, as if such death or revocation had not happened or been made, and a solemn declaration made by any such attorney that he has not received any notice of the revocation of such Power of Attorney by death or otherwise, shall, if made immediately before or after executing any such conveyance or other instrument as aforesaid, or doing performing or submitting to any such act as aforesaid, be taken to be conclusive proof of such non-revocation at the time of such execution, in favour of any person who shall *bond fide*, and for valuable consideration, and without notice to himself of any such revocation, have accepted any such conveyance or other instrument from, or dealt with, such attorney in the name of his principal.

RAILWAYS.

22 Vic. No. 19. An Act to make more effectual provision for the construction by the Government of Railways in the Colony of New South Wales and for the regulation of the same. [24th November, 1858.](*)

REAL PROPERTY SUITS LIMITATION.

3 & 4 Wm. IV c. 27. An Act for the limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto. [24th July, 1833.](†)

Meaning of the words in the Act.

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "Land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "Rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compo-

"Land."

"Rent."

(*) The Title only of this Act is given, as all conveyances of lands required for railway purposes are prepared in the office of the Crown Solicitor, and conveyances of lands sold by the Commissioner are not so common as to render it desirable to print the numerous conveyancing sections of the Act.

(†) Adopted by 8 Wm. IV. No. 3, and thereby declared to commence and take effect in the Colony from and after the 1st day of August, 1837.

sitions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim, shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the courtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "Person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Person through whom another claims.

"Person."

Number and gender.

2. And be it further enacted, That after the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same. (25)

No land or rent to be recovered but within twenty years after the right of action accrued to the claimant or some person whose estate he claims.

(25) The word "person" in this section does not include the Crown. *Doe dem Wilson v. Terry*, 4 October, 1849, reported in 2, S. O. R., App. 1, where the earlier case, *Hatfield v. Alford*, is considered. *Quare*, whether adverse possession for sixty years would bar the Crown under 9 Geo. III. c. 18. As to which statute's applicability to this Colony, see Forsyth Const. Law, p. 19, and the remarks of Stephen, C.J., at p. 9 of the case cited. Milford, J., however, in the *Attorney General v. Brown*, 3, S. O. R., p. 26, thought 9 Geo. III. c. 18 to be in force in the Colony.

Nullum Tempus Act.

In *Norton v. Hughes*, 2, S. O. R., Eq., 65, it was held that the Statute of Limitations was a good defence in a suit by trustees against their co-trustee; *secus*, if *certainque* trusts had been plaintiffs. Effect of sections 2, 12, 24, and 25 of the Act considered. See also *Wentworth v. Gurner*, 2, S. O. R., Eq., 105.

As to what acts will amount to a taking possession of land by an owner in the person of an agent or other person authorized by such owner, so as to give a new departure under the statute, see *Brown v. Lethbridge*, reported in *S. M. Herald*, June 28th, 1876:—"If the rightful owner went out of possession, and another person went into possession for a day or for ever so short a time, the Statute would begin to run, and in twenty years from that time, no matter whom, or how many persons, strangers to each other, were in possession, the owner would be barred. The rightful owner could not turn out the person in possession on the completion of the twenty years, although that person had been in possession but a month or a week. The Statute would have destroyed his right. If, however, the rightful owner had been out of possession for nineteen years, or for any time under twenty years, and the land should be unoccupied for ever so short a time, and he should then go on to it, his right would last for twenty years from that entry. He would get a new departure. The owner might become possessed of the land in different ways, by exercising acts of dominion over it, not by walking over it, or by going on to it in the night, or by taking a brick out of the house, as was done in one case, but by doing something with it, or by undoing something another has done on it, as by pulling down a fence erected by another, always supposing the land is for the time at least vacant, for there could not be a mixed possession. It was a taking possession if the person in possession were to accept a lease from the rightful owner, or if he were to become tenant in any way, at will, or any other terms, so long as he recognized a right in the owner. All of the cases cited were alike in principle. A mere entry was not sufficient. The rightful owner must get possession. It would not be effective if he were merely to go on to the land, which was in possession of others—the possession must be exclusive." *Per* Martin, C.J.

In the year 1796, H. purchased lands in New South Wales, and afterwards left that Colony, putting two servants T. and B. in possession as tenants-at-will, who continued in possession until the year 1847, when other parties obtained possession under a title from T. and B.; H. continued absent from the Colony, and died in 1833. H's heir-at-law was then in America, and was residing there in 1857, when he brought an action of ejectment in the Colony to recover possession of the lands. The Supreme Court held that the plaintiff's right of action was barred by the Statute, 3 and 4 Will. IV. c. 27. Upon appeal such judgment was reversed; the Judicial Committee being of opinion, first, that T. and B. were tenants-at-will, and that such tenancy-at-will ended at H's death in 1833; and, secondly, that H's heir-at-law being beyond the seas when the right

When the right shall be deemed to have accrued—
In the case of an estate in possession—
on dispossession

8. And be it further enacted, That in the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say), when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the

of entry accrued upon H's death, he was entitled to the benefit of the 16th section of 3 and 4 W. IV. c. 27, which in the case of a person beyond seas at the time when his title accrued, saved his right for ten years after the twenty years given by the second section, and that his action having been brought within thirty years he was not barred.

The granting of a lease to a third person by the lessor of a tenant-at-will is a determination of the tenancy-at-will, but it does not give the lessor such a right of entry as is contemplated by the Statute 3 and 4 W. IV. c. 27, sec. 2, when the lessor's title is that of a reversioner expectant on a term of years. *Hogan v. Hand and others*, 14, Moore's P. C. Reports, p. 810.

Tenant-at-will without interruption for more than twenty years, during which period he let and transferred portions of the land, with the knowledge and without the interference of the owner in fee. *Held*, to have acquired an indefeasible title against the owner, whose right of entry after that period was barred by the Statute of Limitations.

Per Sir Joseph Napier: "The appeal in this case has been brought against an order pronounced on the 1st September, 1869, in the Supreme Court of New South Wales,* by which it was ordered that the verdict found for the plaintiff herein be set aside and a new trial had between the parties. The action was one of ejectment, in which the plaintiff sought to recover a plot or parcel of ground in the City of Sydney, which had formerly belonged to the late Thomas Day the elder. His residence and the premises on which he carried on his business as a boat builder were situate on this property. In the month of May, 1842, he gave over the business and the property to his eldest son (the late Thomas Day the younger), then of age, and went to reside at Pyrmont with his family. He had other property in addition to that which he gave over to his son. Thomas Day, the younger, having thus been put in possession as ostensible owner of this property, and manager of the business of boatbuilder, continued in the occupation from the month of May, 1842, down to the time of his death in December, 1864. He made his will and devised the property in dispute to his wife for life; she was the plaintiff in the ejectment. The defendants claimed under the will of Thomas Day the elder, who, in 1867, procured attornments from the tenants on the property, to whom Thomas, the son, had let portions. The trial of the ejectment took place before the Chief Justice Stephen and a jury in November, 1868. Evidence was given to prove the circumstances under which Thomas Day the elder gave up the property in question to his son Thomas, and put him in possession in 1842; to show the character of his occupation, and what he did in building on the property and letting to tenants; and that these acts and dealings were known to Thomas Day the elder, and had his sanction. He did not execute any deed of conveyance to his son, and consequently it was admitted on both sides that the estate of the latter at the commencement was, in law, a tenancy-at-will. The occupation of Thomas Day, the son, having been shown to have continued without interruption for twenty-two years, after the commencement of the estate at will in May, 1842, it was submitted at the trial on the part of the defendants, that as it appeared on the evidence that at various dates commencing in or about 1852, Thomas Day (the son) let portions of the property in dispute on yearly and weekly terms, and received rent for the same, and transferred, or purported to transfer, part of the land to his brother William, who let and received rent for the same, of which letting and transfer Thomas Day the father had notice at the times at which they took place respectively; and as the portion of the land sought to be recovered continued to be, to the knowledge and with the sanction of Thomas Day the elder, in the occupation of Thomas Day the younger, or of tenants paying rent to him, until his death in 1864,—“these facts amounted to a determination of the original tenancy-at-will created in May, 1842, and to the creation of a fresh tenancy, so that the Statute of Limitations began to run in favour of Thomas Day, the son, only from such determination.” A nonsuit was called for, but this was refused by the Chief Justice, who, at the close of the evidence on both sides, submitted to the jury certain questions in writing, accompanied by an explanatory charge. In answer to these questions the jury found that the authority given by the father to the son to occupy the property was not upon condition, but in perpetuity in his own right; that the acts of letting and transferring of portions of property by the son were not in violation of the authority given by the father; that these acts were done with his knowledge and assent, and that no fresh authority was afterwards given. The jury having returned these answers, were directed by the Chief

* 8, S. C. R.,
p. 264.

last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him or some person on abatement or death—
on alienation—

Justice to find a verdict for the plaintiff, which they found accordingly. A rule nisi was obtained, to have the verdict set aside and a new trial granted. This rule was afterwards made absolute, the Chief Justice dissenting. The majority of the Court held that the jury were misdirected as to the question whether the original tenancy-at-will was determined by the under-letting. One of the two Judges who constituted the majority thought that the jury were not sufficiently instructed as to implying a new tenancy-at-will from the acts and conduct of the parties without finding an actual agreement. The other Judge was of opinion that the verdict was against evidence. He does not state whether this applied to all the answers of the jury or to which in particular. The material question in this appeal is, whether the occupation of the late Thomas Day the younger, from May, 1842, until December, 1864, was such as to have conferred on him an indefeasible title to the property, so that it passed by his will to his widow and devisee. His occupation at the commencement was that of a tenant-at-will. His father must be taken to be the legal owner and proprietor, subject to the tenancy-at-will. If before and at the time of the death of the son the father's right of entry or of bringing an action to recover this property was barred, the son died seised and the plaintiff's title is good. This depends on the construction and effect of the Statute of Limitations (3 & 4 W. IV. c. 27). The 2nd section of the statute enacts that no person shall make an entry on any land or bring an action to recover it except within twenty years next after the right to make that entry or bring that action shall have first accrued to him. A right of entry may be said to exist at all times in him under whom and at whose will the occupier holds, for he may enter at any time and determine his will. But the 7th section enacts, that the right of the person entitled, subject to a tenancy-at-will, to make an entry or bring an action to recover the land shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. The reasonable construction of this provision is (according to Lord St. Leonards) that the right shall accrue ultimately at the end of a year from the commencement of the tenancy-at-will, though it may accrue sooner by the actual determination of the tenancy. In the present case, the right under the statute must be deemed to have first accrued to Thomas Day, the father, in May, 1843, at which time the tenancy at will under which the occupation began, must, for the purposes of the bar of the statute, be deemed to have determined. The condition of Thomas Day, the son, was, for these purposes, but that of a tenant at sufferance from and after May, 1843, unless and until a subsequent tenancy at will was created by a fresh agreement of the parties. The defendants submitted that there was a determination of the original tenancy within twenty years before the end of the period of limitation. The acts on which they relied, in order to show that the original tenancy was so determined, were consistent with the character of the occupation confided to Thomas, the son, and were beneficial to the property. It seems difficult to conclude that acts which were conformable (not contrary) to his father's will, which had his sanction, and so far were authorized, not wrongful, should have determined the tenancy-at-will. It might be more reasonable to regard them as acts of a like character done by a mortgagor or *cestui que* trust in possession as regarded; that is to say, as impliedly authorized by the character in which, and the circumstances under which he occupies at will. It seems to their Lordships, that as in this case the statute began to run from May, 1843, the question of the subsequent determination of the original tenancy is only relevant so far as it may have been preliminary to the creation of a fresh tenancy-at-will after the determination of the first, and within the period of limitation. In any other view such a determination of the original tenancy after the end of the first year is *per se* irrelevant. When there is an alternative given by the statute sufficient to set it running, it would be inconsistent with its purpose to allow the running to be stopped by the happening of that which, if time had not been running, would in itself have set it running. The actual subsequent determination of the tenancy could only have the effect of making the tenant, for all purposes—when he was already, from the end of the first year, for the purposes of the bar of the statute—a tenant at sufferance. Their Lordships, therefore, are of opinion, that the defence made at the trial by the respondents cannot be maintained. They submitted "that the statute began to run in favour of Thomas Day, junior, only from such determination," i.e., the alleged determination of a fresh tracing, by the acts of letting and transfer by Thomas Day, the son,

in case of future
estates—

through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the

with the knowledge of Thomas Day, the father. Their Lordships are clearly of opinion that the statute began to run in favour of Thomas Day, the son, in May, 1843, at the end of the first year of his tenancy, and that a subsequent determination of that tenancy could not of itself be sufficient to stop the running of the statutory bar. When the statute has once begun to run, it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will. It was contended that there was not only a determination of the original tenancy-at-will, but the creation of a fresh tenancy, inasmuch as after such alleged determination, "the portion of the land sought to be recovered continued to be, to the knowledge and with the sanction of Thomas Day, senior, in the occupation of Thomas Day, junior, or of tenants paying rent to him, until his death in December, 1864." The Chief Justice put the question in writing to the jury, whether, with the knowledge of the acts done by Thomas, the son, a new authority to occupy was given by Thomas, the father, and this was answered in the negative; and afterwards he put orally a question to the jury, whether a new tenancy-at-will was created by a new authority to occupy then given or fresh arrangement made between the parties. This was also answered in the negative by the jury. Their Lordships cannot concur in the opinion of Mr. Justice Cheeke, if he meant to say that both answers were, or that either of them was, contrary to the evidence; nor can they concur in the opinion of Mr. Justice Hargrave, that the jury may have been misled by not having been sufficiently instructed as to their power to imply a new tenancy-at-will from the acts and conduct of the parties without finding an actual agreement. Assuming that there was a determination of the tenancy, and that the occupation of Thomas Day, the son, continued without interruption, to the knowledge and with the sanction of Thomas Day, the father, this would constitute an occupation at sufferance to all intents; and so far as related to the purposes of the statutory bar, no alteration would be made in the *status* of Thomas, the son. The right of entry created by the 7th section of the statute was not thereby waived, suspended, or extinguished; there was no re-vesting of possession; the running of the statute was in nowise impeded. Doubtless an agreement for a fresh tenancy may be implied from acts and conduct, if such are proved as ought to satisfy a jury that the parties actually made such an agreement; and in that event it is proper to be found by a jury as a material fact in issue. No such evidence has been given in this case. The express exception in favour of cases within the 14th section of the Act, where there has been a written acknowledgment of the title, shows the pervading purpose of the Legislature in creating the bar under the previous sections. Besides, as stated by Sir William Erle, C. J., in *Locke v. Matthews* (*), "if the owner enters effectively, and creates a new tenancy-at-will, he has twenty-one years from that period before he can forfeit his estate." The language and policy of the statute require that to constitute this new *terminus a quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy-at-will. The question in effect is, whether the prescribed period has elapsed since the right accrued to make an entry or bring an action to recover the property, where such entry or action might have, but has not, been made or brought within such period. It seems to their lordships that in this case the prescribed period of limitation elapsed at the end of twenty-one years from the commencement of the tenancy-at-will; that whether this tenancy was determined by the acts of the parties is not material, inasmuch as there was not a fresh tenancy-at-will created within this period. They think that the findings of the Jury were according to evidence, and that there was not any misdirection on the part of the Chief Justice by which the Jury could be supposed to have been misled. It is not necessary for their lordships to review in detail, or further to express an opinion on the positions of law in the elaborate and able judgment of the learned Chief Justice. It is enough to say that, in the opinion of their lordships, there was not any misdirection upon any material point; that the findings of the Jury were warranted by the evidence, and that the verdict for the plaintiff is a right verdict and ought not to be set aside. *Day v. Day and others*. 8, Moore's P.C. Reports, N.S., p. 152.

(*) 13, C. B. (N. S.), 764.

receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

4. Provided always, That when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall

in case of forfeiture or breach of condition.

Where advantage of forfeiture

N. died in 1830 in New South Wales, seized of real estate in that Colony; E., his heir-at-law, lived in Ireland, and died there in 1837; J., the heir of E., and also of N., likewise lived in Ireland, and, in the year 1856, went to New South Wales and brought an action of ejectment there to recover the land N. died seized of. The English Statute of Limitations, 3 & 4 W. IV c. 27, had been adopted in the Colony by the Colonial Act 8 W. IV. No. 3. *Held*, affirming the judgment of the Supreme Court, that the Statute 1 Jac. c. 16 (which had been introduced to the Colony by the Statute 9 Geo. IV c. 83, s. 24), was repealed by the 3 & 4 W. IV c. 27, and that J's right of action was barred by sections 2 and 16 of that statute. *Quere*, whether Ireland, by the 19th section of 3 & 4 W. IV c. 27, is with reference to New South Wales to be considered "beyond seas." *Devine v. Holloway*, 14, Moore's P.O. Reports, p. 290.

In 1840 a grant of land, called Redbank, situated near Port Macquarie, issued to David Fergus Laing and to his aunts, Mrs. Hutchinson and Mrs. Gordon, as tenants in common. None of the grantees, as far as the evidence showed, was ever in possession of the land in question. The evidence showed that in 1851 or 1852 a person named Warrell went upon the land, built a mansion, cultivated some parts of the estate, and depastured other parts with stock, and lived there till his death, after which his sons remained upon the estate, and were now there. Other persons also occupied different portions of the land. At the trial it appeared that his Honor Mr. Justice Faucett, who tried the case, was of opinion, that under the Statute of Limitations, to bar title by deed it was necessary to show continuous occupation, not under the owner, by one person or by persons connected and claiming in the same right. *Held*, that it was quite immaterial how or when a person got into possession, where the true owners of the land had been out of possession for twenty years from the entry of the person who was first adversely in possession, and that his Honor's interpretation of the Statute could not be supported—*Doe d. Carter v. Barnard* (3, Q.B., 945), and *Dixon v. Gayfer*, and *Fluker v. Gordon* (17 *Beav.*, 421). *Per* Martin, C.J.: "The action must be brought within twenty years after the right first accrued. How could it be material whether during those twenty years who was in possession or what number of people? The words could not be plainer—No person shall bring an action but within twenty years. The only question was whether or not twenty years had elapsed since the right to bring the action first accrued? No question of who was in possession, or for how long was he in possession, was raised by that section. The right to bring an action did not accrue till some person went into possession. The moment a person without a title went into possession of land a wrong was done to the true owner, and his right to exercise his remedy by bringing an action at once accrued, but not till then. Land might be unoccupied for years, and yet in twenty years the right of the true owner would not be barred. It was the adverse possession of some person which gave the owner the right of action—and the Act in words concise and plain said that if the owner let that right remain unexercised for twenty years it was for ever barred. His Honor was further of opinion that if there was a gap in the possession, the right of action would date back to the time when the possession existed. For it was clear law that if the statute once commenced to run it would not stop except by the owner going into possession, and so getting as it were a new departure. If, then, another person was to go into adverse possession, the statute would again commence to run." Rule for a new trial made absolute. *Laing and others v. Bain and others*, Supreme Court, March 8, 1876.

On the second trial a verdict having been returned for the defendants, a rule for a new trial, on the ground that the verdict was against evidence, was made absolute by a majority of the Court (Faucett, J., *dissentiente*). The grounds of their Honors' decision are shown in the following extract from the judgment of his Honor the Chief Justice:—"The land in question was of large extent, 2,560 acres, with a frontage to the River Hastings of one mile, and a depth of four miles; the back line was a long distance from the river. There was no evidence that the side lines were ever fenced. There was slight evidence that the fences were down, and that the cattle of the neighbours went on to the ground. There was also a bit of evidence given by one of the defendants, who spoke of a time when he was very young, seven or eight years old, that he went after the cattle which grazed up to the remains of an old fence. There was no evidence that the area of 2,560 acres was ever fenced as to its side lines and back line, so as to constitute it an enclosure. There could be no doubt, where the question of occupation was under consideration, if the place spoken of was a house, it was easy to

is not taken by remainderman he shall have a new right when his estate comes into possession.

Reversioner to have a new right.

have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

5. Provided also, That a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate

determine whether there was or was not an occupation. Equally so if it was a garden, enclosed in any manner. Occupation of a small paddock could be easily proved, or of a large paddock, if the land was cleared and tolerably well stocked, and was ridden over in the manner such property was usually looked after. In all of those cases it would be easy for a person who claimed to be in occupation to prove his occupation; but the larger the area claimed, the more difficult the proof, and a greater amount was required. For instance, to prove occupation of one of those areas granted to the *Australian Agricultural Company*, which contained between 200,000 and 300,000 acres, and which extended from Murrurundi to Tamworth, it could not be contended that a man who settled on one corner of the land was in possession and occupation of the whole of it. Such a contention would be absurd. The inference to be drawn from the fact of a person living on, or occupying, a portion of a block of land, would depend on the circumstances of each case; and one of those circumstances would be the extent of the block. A man could not by merely going on to one corner of a block of land, say 10,000 acres in extent, claim to be in possession of the whole. He would have to do something else so as to put the legal owner in the position of a person to whom a right of action had accrued. There would have to be some physical putting of the owner out of his possession. Going into a man's garden and occupying one bed of it would not give the trespasser, at first, possession of the whole of it; he would have to do something more. He would have to keep out the owner. He would have to assert his right over the whole of it. If it was a paddock, he might graze the whole of it with his stock and assert his right to do so at all times without any interference. That was the way occupation had to be proved of unenclosed bush lands. A person could not, by settling down on and enclosing a small portion of an estate of large dimensions, be held to be in occupation of the whole, unless he did something more. If it was enclosed he might go round the fences and warn all other persons off. His cattle might graze up to the boundaries. He must do something to show that he was there asserting ownership of the whole, to the exclusion of all others. His saying that he was in possession, and allowing his cattle to graze over it, would not be sufficient to prove that he was in possession of the whole of it. There was evidence that Worrall warned a timber cutter that he was on Redbank, but that was in 1857, at a period too late to be of any effect; even if it had taken place in 1854 it would only have had reference to that piece of land. In a case like the present the defendants ought to be in a position to show an assertion of a right to keep others from coming beyond certain lines. There was slight evidence that Worrall stated that he knew that the estate consisted of 4 sections; but there was no evidence that he ever intimated an intention to occupy up to any certain boundaries. In the writ the boundaries were duly set out; and there was no evidence that up to any of those lines he asserted a right of occupation—that would have to be shown if the claim was under a conveyance, which would have to contain a description of the land described in the writ. If he only claimed a part, that would have to be clearly proved. The only evidence was, that in 1851 or 1852 Worrall settled on the land; that he had about thirty head of cattle; that eight or nine acres were under cultivation; and that he claimed the whole of the estate. That was not sufficient evidence to show that he was in occupation of the whole. The jury, before they returned a verdict for the defendants, should have had some evidence to show that up to the boundary lines they [i.e., Worrall, whose occupation was relied on as starting the Statute.—Ed.] did something to assert their right of occupation. There was no evidence that he ever went round the boundaries, or knew what they were; nor even that there was a fence on any of the boundaries. At most, the evidence showed that Worrall was on a portion only of the estate; and as to that portion the jury would have been justified in returning a verdict for the defendants. They, however, gave a verdict for the whole. It was, therefore, a verdict without evidence to support it. Assuming that the whole of the evidence given on behalf of the defendants was true, yet there was no evidence to warrant the jury in saying that the defendants were in occupation of the land described in the writ. It appeared to his Honor that the law required a greater amount of precision in a case like the present. If a person was taking possession of the land of another, he should indicate of what he was taking possession; the boundaries should be marked in some way, either by blazed trees or otherwise, and people should be warned off when trespassing. As the verdict was against evidence there should be a new trial. *Laing and others v. Bain and others*, Supreme Court, March 17, 1877.

or interest in reversion, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

6. And be it further enacted, That for the purposes of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

An administrator to claim as if he obtained the estate without interval after death of deceased.

7. And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant-at-will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or cestuique-trust shall be deemed to be a tenant-at-will, within the meaning of this clause, to his mortgagee or trustee.

In the case of a tenant-at-will the right shall be deemed to have accrued at the end of one year.

8. And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

No person after a tenancy from year to year to have any right but from the end of the first year or last payment of rent.

9. And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Where rent amounting to 20s. reserved by a lease in writing shall have been wrongfully received, no right to accrue on the determination of the lease.

10. And be it further enacted, That no person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon.

A mere entry not to be deemed possession.

11. And be it further enacted, That no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.

No right to be preserved by continual claim.

12. And be it further enacted, That when any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants-in-common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

Possession of one coparcener, &c., not to be the possession of the others.

13. And be it further enacted, That when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

Possession of a younger brother not to be the possession of the heir.

14. Provided always and be it further enacted, That when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make any entry or distress or bring an action to recover such land or rent shall be

Acknowledgment in writing given to the person entitled or his agent to be equivalent to possession or receipt of rent.

Where possession is not adverse at the time of passing the Act the right shall not be barred until the end of five years afterwards.

Persons under disability of infancy lunacy coverture or beyond seas and their representatives to be allowed ten years from the termination of their disability or death

But no action, &c., shall be brought beyond forty years after the right of action accrued.

No further time to be allowed for a succession of disabilities.

Scotland Ireland and the adjacent islands not to be deemed beyond seas.

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given.

15. Provided also and be it further enacted, That when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this Act.

16. Provided always and be it further enacted, That if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned (that is to say), infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).

17. Provided nevertheless and be it further enacted, That no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

18. Provided always and be it further enacted, That when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

19. And be it further enacted, That no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the Dominions of His Majesty), shall be deemed to be beyond seas within the meaning of this Act. ⁽²⁶⁾

20. And be it further enacted, That when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land

⁽²⁶⁾ The English Statute of Limitations, 3 & 4 W. IV. c. 27, was adopted in the Colony of New South Wales by the Colonial Act 9 W. IV. No. 3. By the adopting Act it was enacted that the 3 & 4 W. IV. c. 27, and every clause, provision, and enactment therein contained, should be adopted and applied in the administration of justice in the Colony in like manner as other laws of England are therein applied. *Held*, that the 19th section of 8 W. IV. No. 3 has no application to New South Wales, so as to make Great Britain and Ireland places not beyond the sea in reference to that Colony. T. P. M. was the grantee of certain tracts of land in 1837 and 1839, forming an estate called S. In 1848 he mortgaged the said estate to J. P. B., and in 1851 he conveyed the same to J. P. M., then resident in England, without mentioning the mortgage; J. P. M., who never was in Australia, was in possession of his estate by his agent. In 1871, J. P. B. assigned his mortgage to F. W., and he in the same year commenced an action of ejectment to oust the defendants, who were in occupation of different portions of the estate. The defendants did not attempt to establish any title in themselves, though two of them (Gardner and Cundy) insisted that, as they held leases from one L. M. C., who had been in possession of the estate under J. P. M., they were entitled to six months' notice before action. *Held*, that as the 19th section of the Statute of Limitations has no application in New South Wales, the right of entry in the mortgagee would not be excluded till 1878, or till 30 years after his right of entry first accrued. *White v. McDonald and others*, 11, S. C. R., 332.

or rent, no entry, distress, or action shall be made or brought by such person or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

21. And be it further enacted, That when the right of a tenant-in-tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant-in-tail might lawfully have barred.

Where tenant-in-tail is barred remainder-men whom he might have barred shall not recover.

22. And be it further enacted, That when a tenant-in-tail of any land or rent entitled to recover the same shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant-in-tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant-in-tail had so long continued to live, he might have made such entry or distress or brought such action.

Possession adverse to a tenant-in-tail shall run on against the remainder-men whom he might have barred.

23. And be it further enacted, That when a tenant-in-tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue to be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant-in-tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

Where there shall have been possession under an assurance by a tenant-in-tail which shall not bar the remainders, they shall be barred at the end of twenty years after the time when the assurance if then executed would have barred them.

24. And be it further enacted, That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

No suit in equity to be brought after the time when the plaintiff if entitled at law might have brought an action.

25. Provided always and be it further enacted, That when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que* trust or any person claiming through him, to bring a suit against the trustee or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him. ⁽²⁷⁾

In cases of express trust the right shall not be deemed to have accrued until a conveyance to a purchaser.

26. And be it further enacted, That in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bond fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed.

In cases of fraud no time shall run whilst the fraud remains concealed.

27. Provided always and be it further enacted, That nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act.

Saving the jurisdiction of equity on the ground of acquiescence or otherwise. Mortgagor to be barred at the end

28. And be it further enacted, That when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his

⁽²⁷⁾ For an important case where a trust was held to be express for the purposes of this section, see *Norton and others v. Hughes and others*, 5, S. C. R., Eq., 23; and see 2, S. C. R., Eq., pp. 65-70.

of twenty years from the time when the mortgagee took possession or from the last written acknowledgment.

mortgage, the mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

No lands or rents to be recovered by ecclesiastical or eleemosynary corporations sole but within two incumbencies and six years or sixty years.

29. Provided always and be it further enacted, That it shall be lawful for any Archbishop, Bishop, Dean, Prebendary, Parson, Vicar, Master of Hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say), the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies, and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said thirty-first day of December, one thousand eight hundred and thirty-three, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

No advowson to be recovered but within three incumbencies or sixty years.

30. And be it further enacted, That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quære impedit* or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say), the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such patron or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years.

Incumbencies after lapse to be reckoned within the period but not incumbencies after promotions to bishoprics.

31. Provided always and be it further enacted, That when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by His Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by His Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop.

When person claiming an advowson in remainder, &c., after an estate

32. And be it further enacted, That in the construction of this Act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled

to such estate tail, and the right to bring any *quare impedit* action, or suit shall be limited accordingly. tall shall be barred.

33. Provided always and be it further enacted, That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title. No advowson to be recovered after 100 years.

34. And be it further enacted, That at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished. At the end of the period of limitation the right of the party out of possession to be extinguished.

35. And be it further enacted, That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act. Receipt of rent to be deemed receipt of profits.

36. And be it further enacted, That no writ of right patent, writ of right *quia dominus remisit curiam*, writ of right in *capite*, writ of right in London, writ of right close, writ of right de *rationabili parte*, writ of right of advowson, writ of right upon disclaimer, writ de *rationabilibus divisis*, writ of right of ward, writ de *consuetudinibus et servitiis*, writ of *cessavit*, writ of *escheat*, writ of *quo jure*, writ of *secta ad molendinum*, writ de *essendo quietum de theolonia*, writ of *ne injuste vexes*, writ of *messe*, writ of *quod permittat*, writ of *formedon in descender*, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, *darrein-presentment*, *juris utrim*, or *mort d'ancestor*, writ of entry *sur disseisin*, in the *quibus*, in the *per*, in the *per and cui*, or in the *post*, writ of entry *sur intrusion*, writ of entry, *sur alienation*, *dum fuit non compos mentis*, *dum fuit infra aetatem*, *dum fuit in prison*, *ad communem legem*, in *casu proviso*, in *consimili casu*, *cui in vita*, *sur cui in vita*, *cui ante divortium*, or *sur cui ante divortium*, writ of entry *sur abatement*, writ of entry *quare ejecit*, *infra terminum*, or *ad terminum qui prateriit*, or *causa matrimonii pralocuti*, writ of *aiel*, *besaiel*, *tresaiel*, *cosinage*, or *nuper obiit*, writ of waste, writ of partition, writ of *disceit*, writ of *quod ei deforceat*, writ of covenant real, writ of *warrantia charta*, writ of *curia claudenda*, or writ, *per quae servitia*, and no other action real or mixed (except a writ of right of dower, or writ of dower *undi nihil habet*, or a *quare impedit*, or an ejectment); and no plaint in the nature of any such writ or action (except a plaint for freebench or dower) shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-four. Real and mixed actions abolished after the 31st December 1834.

37. Provided always and be it further enacted, That when on the said thirty-first day of December, one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June, one thousand eight hundred and thirty-five, in case the same might have been brought if this Act had not been made notwithstanding the period of twenty years hereinbefore limited shall have expired. Except for dower *quare impedit* and ejectment.

38. Provided also and be it further enacted, That when, on the said first day of June, one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June, one thousand eight hundred and thirty-five, but only within the period during which by virtue of the provisions of this Act an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away. Real actions may be brought until the 1st June, 1835.

39. And be it further enacted, That no descent cast, discontinuance, or warranty which may happen or be made after the said thirty-first day of December, one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land. No descent warranty, &c., to bar a right of entry.

40. And be it further enacted, That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been Money charged upon land and legacies to be deemed satisfied at the end of twenty years if there shall be no interest paid or

REAL PROPERTY SUITS LIMITATION.

acknowledgment in writing in the mean time.

No arrears of dower to be recovered for more than six years.

No arrears of rent or interest to be recovered for more than six years.

Act to extend to the Spiritual Courts.

Act not to extend to Scotland nor to advowsons in Ireland.
Act may be amended.

paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given. (*)

41. And be it further enacted, That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

42. And be it further enacted, That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

43. And be it further enacted, That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any tithes, legacy, or other property for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any Spiritual Court to recover the same but within the period during which he might bring such action or suit at law or in equity.

44. Provided always and be it further enacted, That this Act shall not extend to Scotland; and shall not, so far as it relates to any right to permit to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland.

45. And be it further enacted, That this Act may be amended altered or repealed during this present Session of Parliament.

REAL ESTATE OF INTESTATES DISTRIBUTION.

26 Vic. No. 20. An Act to alter the succession to Real Estate in cases of Intestacy. [Reserved, 20th December, 1862. Assent proclaimed, 21st July, 1863.]

WHEREAS it is expedient to alter the law relating to the succession to real estate in cases of intestacy: Be it therefore, &c., &c. :—

Intestate land not heritable but to pass as personality.

Land to be included in inventory, &c.

Curtsey and dower retained.

A Judge may make special

1. From and after the passing of this Act all land which, by the operation of the law relating to real property now in force, would upon the death of the owner intestate in respect of such land pass to his heir-at-law, shall instead thereof pass to and become vested in his personal representatives, in like manner as is now the case with chattel real property. (28)

2. Lands held in trust or by way of mortgage, passing under this Act, shall be subject to the same trusts and equities as the same would have been subject to if they had descended to the heir, and all other lands so passing shall be included by the administrator in his inventory and account, and be disposable in like manner as other personal assets, without distinction as to order of application, for payment of debts or otherwise: Provided that nothing herein contained shall give to any husband on the death of his wife intestate any greater interest in the real estate of his wife, or in the produce thereof upon sale, than a tenancy for life by the curtesy, nor to any widow a greater interest in the real estate of her husband on his death intestate than the rights she would otherwise have had as dowress thereon (29): And provided also that in case of the sale of any such real estate by virtue of this Act, provision shall be made by order of the Court or Judge for securing out of the produce of the sale such payments as shall be equivalent to the right of such husband or wife as tenant by the curtesy or dowress.

3. It shall be lawful from time to time for any Judge of the Supreme Court, upon the application of the administrator or of any person beneficially interested, and after such

(*) Extended by 26 Vict. No. 12, sec. 36, to cases of claims to estates of intestates, *post*.

(29) Ejectment by administrator and administratrix *de bonis non* against heir-at-law of intestate. *Held*, that legal estate was in plaintiff under sec. 1 of 26 Vict. No. 20 and sec. 25 of 26 Vict. No. 12. *Norman and wife v. Peck*, S.C., September 11th, 1876.

previous notice to other parties and inquiry as he shall think fit, to order and direct the course of proceeding which shall be taken in regard to the time and mode of sale of such land—the letting and management thereof until sale—the application for maintenance or advancement or otherwise of shares of infants—the expediency and mode of effecting a partition if applied for—and generally in regard to the administration of the property for the greatest advantage of all persons interested. ⁽³⁰⁾

4. In any case wherein upon such inquiry the Judge shall be satisfied that a partition of the land would be advantageous to the parties interested therein, it shall be lawful for such Judge to appoint one or more arbitrators to effect such partition, and to exercise in regard thereto under his direction and control powers similar to those of Commissioners acting under a decree in equity for partition: And the report and final award of the said arbitrators, setting forth the particulars of the land allotted to each party interested, shall, when signed by them and confirmed by the order of a Judge and when also registered in the office of the Registrar General, be effectual without the necessity of any further conveyance to vest in each allottee the land so allotted: And if such allotment be made subject to the charge of any money payable to any other party interested for equalizing the partition, such charge shall take effect according to the terms and conditions in regard to time and mode of payment and otherwise which shall be expressed in such award, without the necessity of any further instrument being made or executed.

order relating thereto.

Judge may order partition.

5. It shall be lawful for the Supreme Court from time to time to make rules ^(*) for the ordinary guidance of administrators in relation to real estate administered as personal assets either by inserting the same in letters of administration, or promulgating the same in like manner with other general rules affecting the practice of the Court: Provided that no such rules shall prejudice or control the effect of any special order to be made by a Judge upon such inquiry as aforesaid in any particular case; but provided further that every such special order shall be subject to control or revision by the full Court, on appeal thereto, by the administrator or any other party interested: Provided that a copy of such rules shall be laid before both Houses of Parliament within one month from the issue thereof if Parliament be then in Session, or otherwise within one month after the commencement of the next ensuing Session.

Supreme Court may frame general rules.

6. The preceding provisions shall be alike applicable to any executor to whom in case of partial intestacy land shall pass under this Act, also to the Curator of Intestate Estates and to any other person fulfilling a like duty.

Same rules to apply to executors and administrators by Curator of Intestate Estates.

7. No executor or administrator shall be required against his own consent to continue the duty of a trustee by managing the property during an enforced suspension of sale, but shall be entitled, upon such suspension being ordered, to relinquish his trust to such officer of the Court or other person as the Court or Judge shall appoint.

Administrator's trust not to be prolonged without his own consent.

(*) So far as the editor has been able to learn, no rules have been promulgated under the power conferred by this section.

⁽²⁵⁾ M. died intestate in 1865, and his widow as administratrix sold the freehold estate to which he was entitled at his death, and out of which she was dowerable. *Held*, that the Act 26 Vict., No. 20, confers on the administrator a statutory title in all the real estate of an intestate, without the intervention of any order for sale by the Court or a Judge. *Held* also, that the provisions of the 2nd section of the Act primarily refer to estates sold under the directions of the Court, and do not apply to this case. *Held*, further, that the administratrix (who claimed to be entitled to one-third of the annual value of the property at the time of intestate's death, viz., £100, or in other words, to retain the sum of £341 3s. 4d. as the cash value of an annuity of £33 6s. 8d. upon an age of thirty-five years at 8 per cent.) was entitled as to dower only out of the proceeds of the sale, reckoned as if invested in Government debentures at 6 per cent.—one-third of such income to form the basis of the calculation of the present value of an annuity for her life—which lump sum she might be at liberty to retain out of the balance in hand for her dower. *Ex parte Murphy*, 6, S.C.R., Eq., p. 63.

⁽³⁰⁾ In an application to the Court under this section, by petition in a summary way, the Court will give all necessary directions as in an administration suit. In this case the Court ordered the administrator to execute a conveyance of the land of the deceased intestate to the next of kin. (See the remarks of Stephen, C.J., and Milford, J., upon the difficulty of carrying out the provisions of the Act.) In the matter of *H. Carvell, deceased*, 3, S.C.R., 354. An appeal will lie to the full Court in its Ecclesiastical Jurisdiction, from the order of a Judge upon a petition under the 26 Vict. No. 20, s. 3. Upon such a petition the Judge will not interfere with the discretion of the administrator, unless it is clearly wrong; and, *a fortiori*, the Court on appeal will not interfere therewith when the Judge in the first instance has declined to do so, unless a strong case be shown for such interference. Order of Hargrave, J., dismissing with costs the petition of a party interested in the real estate of an intestate, praying that the administrator might be directed to sell the same, reversed as to the costs, and no costs of appeal given. (Hargrave, J., *dissentiente*.) *Re Wood, intestate*, 9, S.C.R., p. 269.

REAL ESTATE OF INTESTATES DISTRIBUTION.

Short title.
Commencement.

8. This Act shall be styled and may be cited as the "Real Estate of Intestates Distribution Act of 1862," and shall take effect from and after the first day of July, one thousand eight hundred and sixty-three.

REAL PROPERTY. (*)

26 Vic. No. 9. An Act for the Declaration of Titles to Land and to facilitate its Transfer. [7th November, 1862.]

Preamble.

WHEREAS it is expedient to provide for the declaration of titles to land and to facilitate the transfer of land: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Preliminary.

Repeal of previous Acts.

1. All laws, statutes, acts, ordinances, rules, regulations, and practice whatsoever relating to freehold and other interests in land, so far as inconsistent with the provisions of this Act, are hereby repealed so far as regards their application to land under the provisions of this Act, or the bringing of land under the operation of this Act.

Short title.

2. This Act may be cited for all purposes as the "Real Property Act."

Interpretation.

3. In the construction and for the purposes of this Act, and in all instruments purporting to be made or executed thereunder (if not inconsistent with the context and subject matter), the following terms in inverted commas shall bear the respective meanings set against them:—

"Land"—Land, messuages, tenements, and hereditaments corporeal and incorporeal of every kind and description, or any estate or interest therein, together with all paths, passages, ways, watercourses, liberties, privileges, easements, plantations, gardens, mines, minerals, and quarries, and all trees and timber thereon or thereunder lying or being, unless any such are specially excepted.

"Grant"—Any Crown grant of land.

"Proprietor"—Any person seised or possessed of any freehold or other estate or interest in land, at law or in equity, in possession, in futurity, or expectancy.

"Transfer"—The passing of any estate or interest in land under this Act, whether for valuable consideration or otherwise.

"Transmission"—The acquirement of title to or interest in land consequent on the death, will, intestacy, bankruptcy, insolvency, or marriage of a proprietor.

"Mortgage"—Any charge on land created merely for securing a debt.

"Mortgagor"—The proprietor of land or of any estate or interest in land pledged as security for a debt.

"Mortgagee"—The proprietor of a mortgage.

"Encumbrance"—Any charge on land created for the purpose of securing the payment of an annuity or sum of money other than a debt.

"Encumbrancer"—The proprietor of any land, or of any estate or interest in land, charged with any annuity or sum of money other than a debt.

"Encumbrancee"—The proprietor of an encumbrance.

"Lunatic"—Any person who shall have been found to be a lunatic upon inquiry by the Supreme Court, or by any Judge thereof, or upon a commission of inquiry issuing out of the Supreme Court in the nature of a writ *de lunatico inquirendo*.

"Person of unsound mind"—Any person not an infant, who, not having been found to be a lunatic, shall be found upon like inquiry to be incapable from infirmity of mind to manage his own affairs.

"Consular Officer"—Consul General, Consul, and Vice-Consul, and any person for the time discharging the duties of Consul General, Consul, or Vice-Consul.

"Instrument"—Any grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate, or exemplification of will, or any other document in writing relating to the transfer or other dealing with land or evidencing title thereto.

"Sworn valuator"—Any person appointed by the Governor with the advice of the Executive Council to value land under this Act.

The describing any person as a proprietor, transferor, transferee, mortgagor, mortgagee, encumbrancer, encumbrancee, lessor, or lessee, or as trustee, or as seised of, having, or taking any estate or interest in any land, shall be deemed to include the heirs, executors, administrators, and assigns of such person.

(*) This Act is often, and perhaps more correctly, cited as the "Land Transfer Act." It has, however, been so familiarized under the title "Real Property Act," that it has been printed in this collection under that head. It is also very commonly known as "Torrens's Act."

And generally, unless the contrary shall appear from the context, whenever a form in any Schedule hereto is directed to be used, such direction shall apply equally to any form to the like effect signed by the Registrar General or stamped with his seal or which for the same purpose may be authorized in conformity with the provisions of this Act; and any variation from any such form, not being in matter of substance, shall not affect its validity or regularity, but it may be used with such alterations as the character of the parties or the circumstances of the case may render necessary.

PART I.—*Appointment, powers, and functions of Employees.*

4. The department of the Registrar General shall be the department authorized to carry into execution the provisions of this Act, and the Registrar General and other officers and clerks of the said department at the time of this Act coming into operation shall perform all the duties of their respective offices under this Act. Existing officers to perform duties under this Act.

5. The Governor, with the advice of the Executive Council, may appoint to the said department such Deputy Registrars General and other officers and clerks as may be necessary for carrying out the provisions of this Act, and may likewise appoint two or more persons being barristers or solicitors to be "Examiners of Titles," hereinafter styled "Examiners," to advise and assist in carrying out the said provisions. Appointment of Examiner of Titles officers and clerks.

6. The Governor with the advice aforesaid may appoint three or more persons, of whom the Registrar General shall be one *ex officio*, to be Commissioners for investigating and dealing with applications for bringing land under the provisions of this Act and for other purposes hereinafter appointed. The style of such Commissioners shall be "The Land Titles Commissioners," hereinafter styled "Commissioners." The unofficial members shall be remunerated by fees specified in the Schedule hereunto marked P, and at all meetings two shall form a quorum. Appointment of Commissioners.

7. The Registrar General shall have and use a seal of office bearing the impression of the Royal Arms of England, and having inscribed in the margin thereof the words "Registrar General of New South Wales"; and every instrument bearing the imprint of such seal, and purporting to be signed or issued by the Registrar General or by any Deputy Registrar General, shall be received in evidence, and shall be deemed to be signed or issued by or under the direction of the Registrar General, without further proof, unless the contrary be shown. Registrar's seal of office.

8. Whenever by any law for the time being in force in the Colony, anything is appointed to be done by the Registrar General, the same may be lawfully done by any Deputy Registrar General. Functions of Deputy Registrar General.

9. It shall not be lawful for any person whilst holding the office of Examiner of Titles or of Land Titles Commissioner under this Act, to engage in private practice as a barrister or as an attorney or solicitor or be in partnership with or employed by any attorney or solicitor. Examiners and Commissioners not to practice.

10. The oath following shall be taken before one of the Judges of the Supreme Court by the persons at present holding the offices of Registrar General or Deputy Registrar General respectively, and by every Registrar General and Deputy Registrar General hereafter appointed, before entering upon the execution of his office under this Act— Oaths of office.

I A.B. do solemnly swear that I will faithfully and to the best of my ability execute and perform the office and duties of Registrar General or Deputy Registrar General for the Colony of New South Wales: So help me God.

11. The Registrar General may exercise the following powers, that is to say—

(1.) He may require the proprietor, or other person making application to have any land brought under the provisions of this Act, or the proprietor or mortgagee or other person interested in any land under the provisions of this Act, in respect of which any transfer, lease, mortgage, encumbrance, or other dealing, or any release from any mortgage or encumbrance, is about to be transacted, or in respect of which any transmission is about to be registered, or registration abstract granted, under this Act, to produce any grant, certificate of title, conveyance, deed, mortgage, lease, will, or other instrument in his possession, or within his control, affecting such land or the title thereto. Powers of Registrar. To inspect documents.

(2.) He may summon any such proprietor, mortgagee, or other person as aforesaid to appear and give any explanation respecting such land or the instruments affecting the title thereto, and if upon requisition in writing made by the Registrar General such proprietor, mortgagee, or other person refuses or neglects to produce any such instrument, or to allow the same to be inspected, or refuses or neglects to give any explanation which he is hereinbefore required to give, or knowingly misleads or deceives any person hereinbefore authorized to demand any such explanation, he shall for each such offence incur a penalty not exceeding one hundred pounds; and the Registrar General, if the instrument or information so withheld appears to him material, shall not be bound to proceed with the bringing of such land under the provisions of this Act, or with To summon and examine witnesses.

REAL PROPERTY.

- the registration of such transfer or other dealing, or with the issuing of such registration abstract, as the case may be.
- To administer oaths. (3.) He may administer oaths or may take a statutory declaration in lieu of administering an oath.
- To correct errors. (4.) He may, upon such evidence as shall appear to him and the Land Titles Commissioners sufficient in that behalf, correct errors in certificates of title or in the register book, or in entries made therein respectively, and may supply entries omitted to be made under the provisions of this Act: Provided always that in the correction of any such error he shall not erase or render illegible the original words, and shall affix the date on which such correction was made or entry supplied with his initials, and every certificate of title so corrected, and every entry so corrected or supplied, shall have the like validity and effect as if such error had not been made or such entry omitted, except as regards any entry made in the register book prior to the actual time of correcting the error or supplying the omitted entry.
- To enter caveats. (5.) He may enter caveat on behalf of any person who shall be under the disability of infancy, coverture, lunacy, unsoundness of mind, or absence from the Colony, or on behalf of Her Majesty, her heirs, or successors, to prohibit the transfer or dealing with any land belonging or supposed to belong to any such persons as hereinbefore mentioned, and also to prohibit the dealing with any land in any case in which it shall appear to him that an error has been made by misdescription of such land or otherwise in any certificate of title or other instrument or for the prevention of any fraud or improper dealing.

PART II.—*Procedure in bringing land under the provisions of this Act.*

- Land alienated in fee from the Crown after this Act to be subject to its provisions. 12. All waste lands, and all lands set apart for public purposes, remaining unalienated from the Crown on the day on which this Act shall come into operation, shall when alienated in fee be subject to the provisions of this Act. The grants of such land shall be in duplicate, and every such grant in addition to proper words of description shall contain a diagram of the land thereby granted on such scale as the Governor with the advice aforesaid, may from time to time direct, and shall be delivered to the Registrar General who shall register the same in manner hereinafter directed.
- Land granted prior to this Act may be brought under its operation. 13. Land alienated from the Crown in fee, prior to the day on which this Act shall come into operation (whether such land shall constitute the whole or only part of the land included in any grant) may be brought under the provisions of this Act in the following manner, that is to say,—The Registrar General shall receive applications in form A of the Schedule hereto if made by any of the following persons:—
- By any person claiming to be the person in whom the fee simple is vested in possession, either at law or in equity: Provided that wherever trustees seized in fee simple have no express power to sell the land which they may seek to bring under the operation of this Act, the person claiming to be beneficially entitled for the first life estate or other greater estate than a life estate in the said land, shall join in such application.
- By any person claiming a life estate in possession, or a leasehold for a life or lives, or having a term of not less than twenty-five years then current: Provided that except in the case of an application by a lessee as regards the concurrence of his lessor, all persons claiming to be beneficially entitled in reversion or remainder shall join in such application.
- Undivided share and mortgaged lands may not be brought under Act except upon conditions. Provided always that no such application shall be received from any person claiming to be entitled to an undivided share of any land, unless the person who shall appear to be entitled to the other undivided share of the said land shall join in such application, with a view to bringing the entirety under the provisions of this Act, nor from the mortgagor of any land unless the mortgagee shall join in such application, nor from the mortgagee of any land except in the exercise of a power of sale contained in the mortgage deed, nor for any land subject to the lien of any judgment or execution creditor unless such creditor shall consent to such application, nor from a married woman unless her husband shall join in such application: Provided also that the father, or if the father be dead the mother or other guardian of any infant, or the committee or guardian of any lunatic or person of unsound mind, may make such application in the name of such infant, lunatic, or person of unsound mind.
- Applicant to surrender instruments of title and to furnish abstract if required. 14. Every such applicant shall, when making his application, deposit with the Registrar General all instruments in his possession or under his control constituting or in any way affecting his title, and in the case of a leasehold a duplicate or certified copy of the lease and of any other instrument under which the applicant claims title, and shall furnish a schedule of such instruments, and also if required an abstract of his title, and shall in his application state the nature of his estate or interest, and of every estate or interest held therein by any other person, whether at law or in equity in possession or in futurity

or expectancy, and whether the land be occupied or unoccupied, and if occupied the name and description of the occupant and the nature of his occupancy and whether such occupancy be adverse or otherwise⁽³¹⁾, and shall state the names and addresses of the occupants and proprietors of all lands contiguous to the land in respect to which application is made, so far as known to him, and that the schedule so furnished includes all instruments of title to such land in his possession or under his control, and shall make and subscribe a declaration to the truth of such statement; and such applicant may if he think fit in his application require the Registrar General, at the expense of such applicant, to cause personal notice of his application to be served upon any person whose name and address shall for that purpose be therein stated.

15. Upon the receipt of such application the Registrar General shall cause the title of the applicant to be examined and reported upon by the Examiners, and shall thereafter refer the case to the Lands Titles Commissioners for their consideration, and if it shall appear to such Commissioners that the applicant proprietor is the original grantee from the Crown of the land in respect to which application is made, and that no sale, mortgage, or other encumbrance or transaction affecting the title of such land, has at any time been registered in the Colony, and that such applicant has not required notice of his application to be served personally upon any person, then in such case it shall be lawful for the Commissioners to direct the Registrar General to bring such land under the provisions of this Act forthwith, by issuing to the applicant proprietor or to such person as he or the person applying in his behalf may by writing under his hand direct, a certificate of title for the same as hereinafter described.

Application how to be dealt with.

When applicant is original grantee and no transactions registered.

16. If it shall appear to the satisfaction of the Commissioners, that the land in respect to which application has been made, is held by the applicant for the estate or interest described in such application free from mortgage, encumbrance, or other beneficial interest affecting the title thereto, or if any such mortgage, encumbrance, or interest remain unsatisfied, that the parties interested therein are also parties to such application, and that the applicant has not required notice of his application to be served personally on any person, then, and in any such case, the Commissioners shall direct the Registrar General

When applicant is not original grantee or any transactions registered.

⁽³¹⁾ An application to have lands brought under the operation of the Real Property Act of 1862 must be entertained by the Registrar General, although it appears by the terms of the application that the lands in question are, as a matter of fact, occupied by a person who does not claim in any way to be there under the applicant. *Per* Stephen, C.J. "I assent to this conclusion with reluctance, and, as already intimated, after much hesitation. The Act was not passed, as I conceive, to enable persons to try either litigated or doubtful questions of title to real property. Although called by a more comprehensive name, this law has one sole object—that of simplifying the process, previously most cumbersome and burthensome, by which such property may be transferred. The Act assumes, therefore, in the prescribed form of application, that the person seeking the benefit of its provisions is indisputably the owner—already ascertained, and actually in possession. Nor can any land be brought under them, accordingly, where there is a divided or in any degree an antagonistic interest, without the concurrence of all parties. There are clauses, of course, directing notice to be given to various persons, not on the land described merely or to its occupiers, but to those who are on adjoining lands also, lest by possibility other claimants should exist, or a neighbour's boundaries be mistakenly included. And, as a necessary preliminary to transferring land, the right to do so must be obviously shown to the tribunal which is to sanction and perfect the transfer. But the legislature, surely, could never have intended to enable an applicant, under the pretence (for it is nothing better) of desiring only an inexpensive mode of transferring his property, to proceed in effect against an adverse claimant, or at all events a person in actual adverse possession, and compel the latter thereupon to disclose, if not establish, his right to that possession. The immediate consequence of this is, obviously, or it undoubtedly may be, to reverse all long-established rules, by casting the burthen of proof upon the possessor, instead of requiring it from him who merely asserts the right to be possessed. And I discover no set-off against that consequence, in the main so injurious to sound policy, beyond this—that in some cases, perhaps, the advantage may be gained, if it be one, of enabling a claimant to establish an equitable and possibly long-dormant title, without the intervention of either a Judge or a jury, upon evidence which would not be admissible in a court of law. It is sufficient to say, however, that—if our construction of the statute be correct—these possible consequences are not to be regarded. It may, moreover, probably be found practicable occasionally to avoid them. But, whatever the incidental result, it follows from this judgment that every man claiming a title to landed property, although possessed adversely by another for many years (any period short of twenty years), may bring it under this conveyancing statute, and cause an indefeasible title thereto to be recorded through the Commissioners, in his favour, against all the world."

Ex parte Hamilton, 3, S. C. R., 311.

See also other cases under this section cited in note ⁽³⁴⁾.

to cause notice of such application to be advertised once in in at least one daily newspaper published in Sydney, and sha a time not less than one month, nor more than twelve mo. advertisement in the *Gazette*, upon or after the expiration of which, shall, unless he shall in the interval have received a caveat forbida proceed to bring such land under the provisions of this Act.

When evidence of title is imperfect.

17. If it shall appear to the satisfaction of the Commissioners that any ested in any unsatisfied mortgage, or encumbrance, affecting the title to such beneficially interested therein, are not parties to such application, or that the eviden title set forth by the applicant is imperfect, or that the applicant has required notice his application to be served personally upon any person, then and in such case, it shall be lawful for the Commissioners to reject such application altogether, or at their discretion to direct the Registrar General to cause notice of such application to be served in accordance with such requirement upon all persons who shall appear to them to have any interest in the land which is the subject of such application, and to be advertised three times in at least one daily newspaper published in Sydney, and in such newspapers published elsewhere as to such Commissioners may seem fit, and to be published in the *Government Gazette*, and in the *London Gazette*, and in the official Gazettes of each of the Colonies of Victoria, South Australia, Queensland, Tasmania, and New Zealand, or in any one or more of such Gazettes, and the Commissioners shall specify the number of times and at what intervals such advertisements shall be published in each or any of such Gazettes, and shall also limit and appoint a time not less than two months nor more than two years from the date of the first of such advertisements in the *Gazette*, upon or after the expiration of which it shall be lawful for the Registrar General to bring such land under the provisions of this Act, unless he shall in the interval have received a caveat forbidding him to do so.

Notice of application to be published.

18. The Registrar General shall, under such direction as aforesaid, or under any order of the Supreme Court, cause notice to be published, in such manner as by such direction or order may be prescribed, that application has been made for bringing the land therein referred to under the provisions of this Act, and shall also cause copy of such notice to be posted in a conspicuous place in his office, and in such other places as he may deem necessary, and shall forward by registered letter marked outside "Lands Titles Office," through the post office, copy of such notice addressed to the persons, if any, whom the Commissioners shall have directed to be served with such notice, and to the persons if any, stated in the declaration by the applicant proprietor to be in occupation of such land, or to be occupiers or proprietors of land contiguous thereto, so far as his knowledge of the addresses of such persons may enable him, and in case such applicant shall have required any such notice to be personally served upon any person named in his application, then and in such case the Registrar General shall cause copy of such notice to be so served upon such person.

Land brought under Act.

19. If within the time limited in such direction, or under any order of the Supreme Court, any notice forwarded by registered letter as aforesaid shall not be returned to him by the Postmaster General, and if within the time so limited he shall not have received a caveat as hereinafter described forbidding him so to do, and in any case in which personal notice may be required as aforesaid, if he shall have received proof to his satisfaction that such notice has been served, the Registrar General shall pursuant to such direction of the Commissioners bring the land described in such application under the provisions of this Act by issuing to the applicant proprietor or to such person as he or the person applying in his behalf may by any writing under his hand direct, a certificate of title for the same as hereinafter described.

On a return of notices or failure of personal service Registrar General to apply to Commissioners.

20. The Registrar General, whenever any letter containing any notice shall be returned to him by the Postmaster General, shall refer the case to the Commissioners for their further direction, and whenever he shall be made aware that any notice required by any applicant to be served personally has failed to be or cannot be so served, he shall notify the same to such applicant, who if he think fit may by writing under his hand withdraw such requirement, and the Registrar General shall thereupon report the case to the Commissioners who in either such case may reject the application altogether or direct the Registrar General to bring the land therein described under the provisions of this Act forthwith, or after such further interval, notification, or advertisement, as they may deem fit.

Parties interested may enter caveat.

21. Any person having or claiming an interest in any land so advertised as aforesaid, or the attorney of any such person, may within the time by any direction of the Commissioners for that purpose limited, lodge a caveat with the Registrar General in form B of the Schedule hereto, forbidding the bringing of such land under the provisions of this Act, and every such caveat shall particularize the estate, interest, lien, or charge claimed by the person lodging the same, and the person lodging such caveat shall if required deliver a full and complete abstract of his title.

If caveat be received within time limited

22. The Registrar General upon receipt of any such caveat within the time limited as aforesaid, shall notify the same to such applicant proprietor and shall suspend further action in the matter, and the lands in respect of which caveat may have been lodged

shall not be brought under the provisions of this Act until such caveat shall have been withdrawn or shall have lapsed from any of the causes hereinafter provided, or until a decision shall have been obtained from the Court having jurisdiction in the matter.

23. After the expiration of three months from the receipt thereof, every such caveat shall be deemed to have lapsed, unless the person by whom or on whose behalf the same was lodged, shall within that time have taken proceedings in any Court of competent jurisdiction to establish his title to the estate, interest, lien, or charge therein specified, and shall have given written notice thereof to the Registrar General, or shall have obtained from the Supreme Court an order or injunction restraining the Registrar General from bringing the land therein referred to under the provisions of this Act. ⁽³²⁾

24. Any applicant proprietor may withdraw his application at any time prior to the issuing of the certificate of title, and the Registrar General shall in such case upon request in writing signed by such applicant proprietor return to him or to the person if any notified in such application as having a lien upon such instruments the abstract and all instruments of title deposited by such proprietor for the purpose of supporting his application.

25. Upon issuing a certificate of title bringing land under the provisions of this Act, the Registrar General shall stamp as cancelled every instrument of title deposited by the proprietor when making his application, and in the case of a leasehold shall indorse upon the lease so deposited a memorandum stating that such lease has been brought under the provisions of this Act, and shall certify such memorandum under his hand and seal and shall return such lease to the applicant, annexing thereto the certificate of title as aforesaid, and shall file in his office the duplicate or certificate copy of such lease hereinbefore directed to be furnished by such applicant: Provided that if any such instrument shall relate to, or include any property, whether personal or real, other than the land included in such certificate of title, then the Registrar General shall indorse thereon a memorandum cancelling the same in so far only as relates to the land included in such certificate of title, and shall return such instrument to such proprietor, otherwise he shall retain the same in his office, and no person shall be entitled to the production of such instrument so stamped, except upon the written order of the applicant proprietor, or of some person claiming through or under him, or upon the order of a Judge of the Supreme Court.

26. In case an applicant proprietor, or the person to whom an applicant proprietor may have directed certificate of title to be issued, shall die in the interval between the date of his application and the date appointed for the certificate of title to issue in accordance with the provisions hereinbefore contained, the certificate of title shall be issued in the name of such applicant proprietor, or in the name of the person to whom he may have directed it to be issued as the case may require, and such land shall devolve in like manner as if the certificate of title had been issued prior to the death of such applicant proprietor or person so named by him. ^(*)

27. Upon the first bringing of land under the provisions of this Act, whether by the alienation thereof in fee from the Crown, or consequent upon the application of the proprietor as hereinbefore provided, and also upon the registration of the title to an estate of freehold in possession in land under the provisions of this Act, derived through the will or intestacy of a previous proprietor, or under any settlement, there shall be paid to the Registrar General the sum specified in the Schedule hereto marked P, and in the case of land brought under the provisions of this Act by alienation in fee from the Crown, the

(*) The provisions of this section are extended to Crown Grants issued in the name of deceased persons who, if living, would have been entitled to the grants. See 36 Vic. No. 7, sec. 3, *post*.

(32) For counts framed under this and the 21st and 13th sections—see *Stockdale v. Hamilton*, 4, S.C.R., p. 313.

Declaration under section 23 of this statute by caveator, alleging that the defendants had unjustifiably put him (plaintiff) to expense, by falsely asserting title to certain land, and endeavouring to procure a certificate of title thereto, notwithstanding the fact that he was seized and entitled, as defendants well knew. Averment, that plaintiff had lodged his caveat, and that notice of the suit had been duly given. Allegation, that plaintiff had instituted said suit in order to establish his title, and to obtain an order restraining the defendants and Registrar General from bringing said land under provisions of the Act, as well as to recover damages, &c. *Held*, in demurrer, that the action was maintainable. *Stockdale v. Hamilton*, 5, S.C.R., p. 180; see also 3, S.C.R., p. 311, and 4, S.C.R., p. 313.

Where the declaration framed under the 23rd section of the Real Property Act, alleging that the plaintiff was seized and was in possession of land, and that the defendants knew these facts, but that the defendants, notwithstanding, falsely alleged themselves to be seized and in possession, and thereupon applied for a title under the Act, the Court refused a new count to be added, resting plaintiff's case on possession only. *Stockdale v. Hamilton*, 6, S.C.R., p. 261.

price paid for such land shall be deemed and taken to be the value thereof for the purpose of levying such sum, and in all other cases as aforesaid such value shall be ascertained by the oath or solemn affirmation of the applicant proprietor or person deriving such land by transmission: Provided always that if the Registrar General shall not be satisfied as to the correctness of the value so declared or sworn to, it shall be lawful for him to require such applicant proprietor, or person deriving such land, to produce a certificate of such value under the hand of a sworn valuator, which certificate shall be received as conclusive evidence of such value for the purpose aforesaid.

Moneys levied to form assurance fund.

28. All sums of money so received shall be paid to the Colonial Treasurer, who shall from time to time invest such sums, together with all interest and profits which may have accrued thereon, in New South Wales Government securities, to constitute an assurance fund for the purposes hereinafter provided.

Reversion expectant on lease not to be extinguished.

29. The bringing of land under the provisions of this Act shall not be held to extinguish the reversion expectant on any lease, and the person named in any certificate of title as entitled to the land therein described, shall be held in every Court of Law and Equity to be seised of the reversion expectant upon any lease that may be noted by memorial thereon, and to have all powers, rights, and remedies to which a reversioner is by law entitled, and shall be subject to all covenants and conditions therein expressed to be performed on the part of the lessor.

PART III.—Register Book—mode of registering and effect of Registration.

Registrar General to keep register book.

30. The Registrar General shall keep a book to be called the "register book," and shall bind up therein the duplicates of all grants, and of all certificates of title, and each grant and certificate of title shall constitute a separate folium of such book, and the Registrar General shall record thereon the particulars of all instruments, dealings, and other matters by this Act required to be registered or entered on the register book, affecting the land included under each such grant or certificate of title, distinct and apart.

Certificate of title to be in duplicate and bound up in register.

31. Every certificate of title shall be in duplicate in the form C of the Schedule hereto, and shall set forth the nature of the estate of freehold in respect to which it is issued, and the Registrar General shall note thereon, in such manner as to preserve their priority, the particulars of all unsatisfied mortgages or other encumbrances and of any dower, lease, or rent charge to which the land may be subject; and if such certificate of title be issued to a minor, or to a person otherwise under disabilities, he shall state the age of such minor, or the nature of the disability so far as known to him, and shall cause one original of each certificate of title to be bound up in the register book, and deliver the other to the proprietor entitled to the land described therein.

If issued to person under disability such disability to be stated.

Registration where certificate of leasehold issued.

32. Before bringing under the provisions of this Act an estate in fee simple or in fee tail in any land in respect to which a certificate of title has been issued for any leasehold estate or interest, the Registrar General shall close the folium of the register book constituted by the certificate of title of such leasehold, and shall carry forward upon the certificate of title issued in respect to such estate in fee, memorials of such leasehold estate or interest, and of all mortgages or other interests affecting the same then registered and still current, and the memorials of all future dealings with such leasehold estate or interest hereinafter directed to be registered shall be entered upon the folium of the register book constituted by the certificate of title representing the fee.

Certificate to be conclusive evidence of title and that the land has been duly brought under the Act.

33. Every certificate of title, duly authenticated under the hand and seal of the Registrar General, shall be received in all Courts of Law and Equity as evidence of the particulars therein set forth, and of their being entered in the register book, and shall be conclusive evidence that the person named in such certificate of title, or in any entry thereon, as seised of or as taking estate or interest in the land therein described, is seised or possessed of or entitled to such land, for the estate or interest therein specified, and that the property comprised in such certificate of title has been duly brought under the provisions of this Act, and no certificate of title shall be impeached or defeasible on the ground of want of notice, or of insufficient notice of the application to bring the land therein described under the provisions of this Act, or on account of any error, omission, or informality in such application, or in the proceedings pursuant thereto, by the Commissioners or by the Registrar General.

Grants and certificates of title registered when embodied in register book. Instruments registered when memorial entered in register book. Definition of registered proprietor.

34. Every land grant and certificate of title shall be deemed and taken to be registered under the provisions and for the purposes of this Act, so soon as the same shall have been marked by the Registrar General with the folium and volume as embodied in the register book; and every memorandum of transfer or other instrument purporting to transfer or in any way to affect land under the provisions of this Act, shall be deemed to be so registered, so soon as a memorial thereof, as hereinafter described, shall have been entered in the register book upon the folium constituted by the existing grant or certificate of title of such land; and the person named in any grant, certificate of title, or other instrument, or registered as seised of or taking any estate or interest, shall be deemed to be the registered proprietor thereof.

35. Except as is hereinafter otherwise provided, every grant or other instrument presented for registration shall begin duplicate, (*) and shall, unless a Crown grant, be attested by a witness, and shall be registered in the order of time in which the same is produced for that purpose; and instruments registered in respect to or affecting the same estate or interest shall, notwithstanding any express, implied, or constructive notice, be entitled in priority the one over the other, according to the date of registration, and not according to the date of each instrument itself, and the Registrar General upon registration thereof shall file one original in his office, and shall deliver the other to the person entitled thereto, and so soon as registered every instrument drawn in any of the several forms provided in the Schedule hereto, or in any form which for the same purpose may be authorized in conformity with the provisions of this Act, shall for the purposes of this Act be deemed and taken to be embodied in the register book, as part and parcel thereof, and such instrument when so constructively embodied, and stamped with the seal of the Registrar General, shall have the effect of a deed duly executed by the parties signing the same.

Instruments to be in duplicate.

Instruments entitled to priority according to date of registration.

And when registered to be deemed embodied in register book and to have the effect of a deed.

General covenants to be implied in instruments.

36. In every instrument creating or transferring any estate or interest in land under the provisions of this Act, there shall be implied the following covenant by the party creating or transferring such estate or interest, that is to say: That he will do such acts and execute such instruments as in accordance with the provisions of this Act may be necessary to give effect to all covenants, conditions, and purposes expressly set forth in such instrument, or by this Act declared to be implied against such party in instruments of a like nature.

37. Every memorial entered in the register book shall state the nature of the instrument to which it relates, the day and hour of the production of such instrument for registration, the names of the parties thereto, and shall refer by number or symbol to such instrument, and shall be signed by the Registrar General.

Memorial defined.

38. Whenever a memorial of any instrument has been entered in the register book, the Registrar General shall, except in the case of transfer or other dealing indorsed upon any grant, certificate, or other instrument as hereinafter provided, record the like memorial on the duplicate grant, certificate, or other instrument evidencing title to the estate or interest intended to be dealt with, or in any way affected, unless the Registrar General shall, as hereinafter provided, dispense with the production of the same, and the Registrar General shall indorse on every instrument so registered a certificate of the date and hour on which the said memorial was entered in the register book, and shall authenticate each such certificate by signing his name and affixing his seal thereto, and such certificate shall be received in all Courts of law and equity as conclusive evidence that such instrument has been duly registered.

Memorial to be recorded on duplicate grant or other instrument.

Certificate of registration to be evidence.

39. No instrument, until registered in manner hereinbefore prescribed, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed the estate or interest specified in such instrument shall pass, or as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments, executed by the same proprietor, and purporting to transfer or encumber the same estate or interest in any land, be at the same time presented to the Registrar General for registration and indorsement, he shall register and indorse that instrument under which the person claims property who shall present to him the grant or certificate of title of such land for that purpose.

Instruments not effectual until entry in register book.

40. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests, as may be notified on the folium of the register book constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor claiming the same land under a prior certificate of title, or under a prior grant registered under the provisions of this Act, and except as regards the omission or misdescription of any right-of-way or other easement created in or existing upon any land, and except so far as regards any portion of land that may by wrong description of parcels or of boundaries be included in the grant, certificate of title, lease, or other instrument evidencing the title of such registered proprietor not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value.

Estate of registered proprietor paramount.

41. The Registrar General shall not register any instrument purporting to transfer or otherwise to deal with or affect any estate or interest in land under the provisions of this Act, except in the manner herein provided, nor unless such instrument be in accordance with the provisions hereof.

Instruments not to be registered unless in accordance with prescribed forms.

(*) By sec. 2 of 36 Vic. No. 7, *post*, no duplicate of a memorandum of transfer is required to be presented for the purpose of registration.

PART IV.—*Dealings.***Transfer.**

42. When land under the provisions of this Act, or any estate or interest in such land, is intended to be transferred, or any right-of-way or other easement is intended to be created or transferred, the registered proprietor may execute a memorandum of transfer in form D or E of the Schedule hereto, which memorandum shall, for description of the land intended to be dealt with, refer to the grant or certificate of title of such land, or shall give such description as may be sufficient to identify the same, and shall contain an accurate statement of the estate, interest, or easement intended to be transferred or created, and a memorandum of all leases, mortgages, and other encumbrances to which the same may be subject, and such memorandum of transfer, if it purports to deal with an estate in respect to which a certificate of title is by this Act authorized to be issued, or if it be indorsed on the instrument evidencing the title of the transferror, need not be in duplicate.

Easements and incorporeal rights to be registered.

43. Whenever any easement or any incorporeal right other than an annuity or rent charge in or over any land under the provisions of this Act is created for the purpose of being annexed to or used and enjoyed together with other land under the provisions of this Act, the Registrar General shall enter a memorial of the instrument creating such easement or incorporeal right upon the folium of the register book constituted by the existing grant or certificate of title of such other land.

If estate of freehold be transferred, certificate of title to be delivered up and cancelled so far as regards the land transferred.

44. If the memorandum of transfer purports to transfer an estate of freehold in possession, in the whole or in part, of the land mentioned in any grant or certificate of title, the transferror shall deliver up the grant or certificate of title of the said land, and the Registrar General shall, after registering the transfer, enter on such grant or certificate of title a memorandum cancelling the same either wholly or partially according as the memorandum of transfer purports to transfer the whole or part only of the land mentioned in such grant or certificate of title, and setting forth the particulars of the transfer. (*)

Fresh certificate to be issued to purchaser.

45. The Registrar General upon cancelling any grant or certificate of title either wholly or partially pursuant to any such transfer, shall make out to the transferee a certificate of title to the land mentioned in such memorandum of transfer, and every such certificate of title shall refer to the original grant of such land and to the memorandum or other instrument of transfer, and the Registrar General shall retain every such memorandum of transfer, and cancelled or partially cancelled grant or certificate of title, and whenever required thereto by the proprietor of an unsold portion or balance of land included in any such partially cancelled grant or certificate of title, or by a registered transferee of such portion or of any part thereof, shall make out to such proprietor or transferee a certificate of title for such portion or for any part thereof of which he is the proprietor or transferee.

A certificate for any untransferred portion to be issued to proprietor or to registered transferee.**Transferee of land subject to mortgage or encumbrance to indemnify transferrer.**

46. In every instrument transferring an estate or interest in land under the provisions of this Act, subject to mortgage or incumbrance, there shall be implied the following covenant by the transferee, that is to say, that such transferee will pay the interest or annuity or rent charge secured by such mortgage or encumbrance, after the rate and at the times specified in the instrument creating the same, and will indemnify and keep harmless the transferror from and against the principal sum secured by such instrument and from and against all liability in respect of any of the covenants therein contained, or by this Act implied, on the part of the transferror.

Transfer of mortgage and of encumbrance and of lease.

47. Upon the registration of any transfer the estate or interest of the transferror as set forth in such instrument, with all rights, powers, and privileges thereto belonging or appertaining, shall pass to the transferee, and such transferee shall thereupon become subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable, if named in such instrument originally as mortgagee encumbrancee or lessee of such land or interest.

Transfer of mortgage or lease transfers right to sue.

48. By virtue of every such transfer, the right to sue upon any memorandum of mortgage or other instrument, and to recover any debt, sum of money, annuity, or damages thereunder (notwithstanding the same may be deemed or held to constitute a chose in action), and all interest in any such debt, sum of money, annuity, or damages, shall be transferred so as to vest the same at law as well as in equity in the transferee thereof: Provided always that nothing herein contained shall prevent a Court of Equity from giving effect to any trusts affecting the said debt, sum of money, annuity, or damages, in case the transferee shall hold the same as a trustee for any other person.

Saving to Courts of Equity as to trusts.**Lands under the provisions of this Act—how leased.**

49. When any land under the provisions of this Act is intended to be leased or demised for a life or lives, or for any term of years exceeding three years, the proprietor shall execute a memorandum of lease in form F of the Schedule hereto, and every such instrument shall, for description of the land intended to be dealt with, refer to the grant or

(*) See, however, the recent Act 36 Vic. No. 7, sec. 1, *post*, as to transfer by indorsement on the certificate.

certificate of title of the land, or shall give such other description as may be necessary to identify such land, and a right for or covenant by the lessee to purchase the land therein described may be stipulated in such instrument; and in case the lessee shall pay the purchase money stipulated, and otherwise observe his covenants, expressed and implied in such instrument, the lessor shall be bound to execute a memorandum of transfer to such lessee of the said land, and the fee-simple thereof, and to perform all necessary acts by this Act prescribed for the purpose of transferring to a purchaser the said land and the fee-simple thereof: Provided always that no lease of mortgaged or encumbered land shall be valid and binding against the mortgagee or encumbrancee, unless such mortgagee or encumbrancee shall have consented to such lease prior to the same being registered.

50. Whenever any lease or demise which is required to be registered by the provisions of this Act, is intended to be surrendered, and the surrender thereof is effected otherwise than through the operation of a surrender in law, or than under the provisions of any law at the time being in force in the Colony relating to insolvent estates, there shall be indorsed upon such lease or on the counterpart thereof the word "Surrendered," with the date of such surrender, and such indorsement shall be signed by the lessee and by the lessor as evidence of the acceptance thereof, and shall be attested by a witness, and the Registrar General thereupon shall enter in the Register Book a memorandum recording the date of such surrender, and shall likewise indorse upon the lease a memorandum recording the fact of such entry having been made in the Register Book, and upon such entry having been so made in the Register Book, the estate or interest of the lessee in such land shall revert in the lessor or in the person in whom, having regard to intervening circumstances (if any), the said land would have vested if no such lease had ever been executed; and production of such lease or counterpart bearing such indorsement and memorandum shall be sufficient evidence that such lease had been so surrendered: Provided that no lease subject to mortgage or encumbrance shall be so surrendered without the consent of the mortgagee or encumbrancee.

Lease may be surrendered by indorsement by lessee with concurrence of lessor.

51. In every memorandum of lease there shall be implied the following covenants against the lessee, that is to say—

Covenants to be implied in every lease against the lessee.

- (1.) That he will pay the rent thereby reserved at the times therein mentioned and all rates and taxes which may be payable in respect of the demised property during the continuance of the lease.
- (2.) That he will at all times during the continuance of the said lease keep, and at the determination thereof yield up the demised property in good and tenantable repair, accidents and damage from fire, storm, and tempest, and reasonable wear and tear excepted.

52. In every memorandum of lease there shall also be implied the following powers in the lessor, that is to say—

Powers to be implied in lessor.

- (1.) That he may by himself or his agents twice in every year during the term, at a reasonable time of the day upon giving to the lessee two days previous notice, enter upon the demised property and view the state of repair thereof, and may serve upon the lessee or leave at his last or usual place of abode in this Colony, or upon the demised property, a notice in writing of any defect, requiring him within a reasonable time, to be therein prescribed, to repair the same.
- (2.) That in case the rent or any part thereof shall be in arrear for the space of six calendar months, or in case default shall be made in the fulfilment of any covenant, whether expressed or implied in such lease, on the part of the lessee, and shall be continued for the space of six calendar months, or in case the repairs required by such notice as aforesaid shall not have been completed within the time therein specified, it shall be lawful for such lessor to re-enter upon and take possession of such demised premises.

53. In any such case the Registrar General, upon proof to his satisfaction of lawful re-entry and recovery of possession by a lessor, shall note the same by entry in the Register Book, and the estate of the lessee in such land shall thereupon determine, but without releasing him from his liability in respect of the breach of any covenant in such lease expressed or implied, and the Registrar General shall cancel such lease if delivered up to him for that purpose.

Registrar General to note particulars of re-entry in Register Book.

54. Whenever any land or estate or interest in land under the provisions of this Act is intended to be charged or made security in favour of any mortgagee, the mortgagor shall execute a memorandum of mortgage in form G of the Schedule hereto, and whenever any such land, estate, or interest is intended to be charged with or made security for the payment of an annuity, rent charge, or sum of money, in favour of any encumbrancee, the encumbrancee shall execute a memorandum of encumbrance in form H of the Schedule hereto, and every such instrument shall contain an accurate statement of the estate or interest intended to be mortgaged or encumbered, and shall for description of the land intended to be dealt with refer to the grant or certificate of title of the land in which such estate or interest is held, or shall give such other description as may be necessary to identify such land together with a statement of all mortgages and other encumbrances affecting the same, if any.

Lands under this Act how mortgaged or encumbered.

Mortgage or encumbrance not to operate as transfer. Procedure in case of default.

55. Mortgage and encumbrance under this Act shall have effect as security, but shall not operate as a transfer of the land thereby charged, and in case default be made in the payment of the principal sum, interest, annuity, or rent charge, or any part thereof thereby secured, or in the observance of any covenant expressed in any memorandum of mortgage or of encumbrance registered under this Act, or that is hereinafter declared to be implied in such instrument, and such default be continued for the space of one calendar month or for such other period of time as may therein for that purpose be expressly limited, the mortgagee or encumbrancee may give to the mortgagor or encumbrancer notice in writing to pay the money then due or owing on such memorandum of mortgage or of encumbrance, or to observe the covenants therein expressed or implied as the case may be, and that sale will be effected unless such default be remedied, or may leave such notice on the mortgaged or encumbered land or at the usual or last-known place of abode in the Colony of the mortgagor or encumbrancer or other person claiming to be then entitled to the said land or with his known agent.

Power to sell.

56. After such default in payment or in observance of covenants continuing for the further space of one calendar month from the service of such notice, or for such other period as may in such instrument be for that purpose limited, such mortgagee or encumbrancee is hereby authorized and empowered to sell the land so mortgaged or encumbered, or any part thereof, and all the estate and interest therein of the mortgagor or encumbrancer, and either altogether or in lots, by public auction or by private contract or both such modes of sale, and subject to such conditions as he may think fit, and to buy in and resell the same without being liable for any loss occasioned hereby, and to make and execute all such instruments as shall be necessary for effecting the sale thereof, all which sales, contracts, matters, and things hereby authorized shall be as valid and effectual as if the mortgagor or encumbrancer had made, done, or executed the same; and the receipt or receipts in writing of the mortgagee or encumbrancee shall be a sufficient discharge to the purchaser of such land, estate, or interest, or of any portion thereof, for so much of his purchase money as may be thereby expressed to be received; and no such purchaser shall be answerable for the loss, misapplication, or non-application, or be obliged to see to the application of the purchase money by him paid, nor shall he be concerned to inquire as to the fact of any default or notice having been made or given as aforesaid; and the purchase money to arise from the sale of any such land, estate, or interest, shall be applied, first in payment of the expenses occasioned by such sale, secondly in payment of the moneys which may then be due or owing to the mortgagee or encumbrancee, thirdly in payment of subsequent mortgages or encumbrances if any in the order of their priority, and the surplus if any shall be paid to the mortgagor or encumbrancer as the case may be.

Appropriation of proceeds.

Registrar General to give effect to sale by mortgagee or encumbrancee.

57. Upon proof to his satisfaction by statutory declaration that such default has been made and continues as aforesaid, the Registrar General shall register any memorandum or instrument of transfer executed by a mortgagee or encumbrancee for the purpose of such sale as aforesaid, and upon such registration the estate or interest of the mortgagor or encumbrancer as therein described to be conveyed, shall pass to and vest in the purchaser freed and discharged from all liability on account of such mortgage or encumbrance or of any mortgage or encumbrance registered subsequent thereto; and if such memorandum of transfer purports to pass an estate of freehold in possession, not being a life leasehold, the purchaser shall be entitled to receive a certificate of title for the same.

In case of default entry and possession or distress ejectment or foreclosure.

58. The mortgagee or encumbrancee, upon default in payment of the principal sum or any part thereof, or of any interest, annuity, or rent charge secured by any mortgage or encumbrance, may enter into possession of the mortgaged or encumbered land by receiving the rents and profits thereof, or may distrain upon the occupier or tenant of the said land under the power to distrain hereinafter contained for the rent then due, or may bring an action of ejectment to recover the said land either before or after entering into the receipt of the rents and profits thereof, or making any distress as aforesaid, and either before or after any sale of such lands shall be effected under the power of sale given or implied in his memorandum of mortgage or of encumbrance in the same manner in which he might have made such entry or distress or brought such action if the principal sum or annuity were secured to him by a conveyance of the legal estate in the land so mortgaged or encumbered, and any such registered mortgagee shall be entitled to foreclose the right of the mortgagor to redeem the said mortgaged or encumbered lands in manner hereinafter provided.

Notice by mortgagee to tenant to pay rent to him to suspend mortgagor's right as landlord.

Mortgagee's receipts to be absolute discharges.

59. Whenever a mortgagee or encumbrancee shall give notice of his demanding to enter into receipt of the rents and profits of the mortgaged or encumbered land to the tenant or occupier or other person liable to pay or account for the rents and profits thereof, all the powers and remedies of the mortgagor or encumbrancer in regard to receipt and recovery of and giving discharges for such rents and profits shall be suspended and transferred to the said mortgagee or encumbrancee until such notice be withdrawn, or the mortgage or encumbrance shall be satisfied and a discharge thereof duly registered; and in every such case the receipt in writing of the mortgagee or encumbrancee shall be a sufficient discharge for any rents and profits therein expressed to be

received, and no person paying the same shall be bound to inquire concerning any default or other circumstance affecting the right of the person giving such notice beyond the fact of his being duly registered as mortgagee or encumbrancee of the land: Provided that nothing herein contained shall interfere with the effect of any rule, order, or judgment of the Supreme Court, in regard to the payment of rent under the special circumstances of any case, nor shall prejudice any remedy of the mortgagor or encumbrancer against the mortgagee or encumbrancee for wrongful entry or for an account.

60. Any mortgagee or encumbrancee of leasehold land under the provisions of this Act, or any person claiming the said land as a purchaser or otherwise from or under such mortgagee or encumbrancee after entering into possession of the said land or the rents and profits thereof, shall, during such possession, and to the extent of any rents and profits which may be received by him, become and be subject and liable to the lessor of the said land or the person for the time being entitled to the said lessor's estate or interest in the said land, to the same extent as the lessee or tenant was subject to and liable for, prior to such mortgagee, encumbrancee, or other person entering into possession of the said land or the rents and profits thereof.

Mortgagee of leasehold entering into possession liable to lessor.

61. Upon the production of any memorandum of mortgage or of encumbrance, having thereon an endorsement signed by the mortgagee or encumbrancee and attested by a witness discharging the land estate or interest from the whole or part of the principal sum or annuity secured, or discharging any part of the land comprised in such instrument from the whole of such principal sum or annuity, the Registrar General shall make an entry in the Register Book noting that such mortgage or encumbrance is discharged wholly or partially, or that part of the land is discharged as aforesaid, as the case may require, and upon such entry being so made the estate or interest or the portion of land mentioned or referred to in such indorsement as aforesaid shall cease to be subject to or liable for such principal sum or annuity, or as the case may be, for the part thereof noted in such entry as discharged.

Discharge of mortgages and encumbrances.

62. Upon proof of the death of the annuitant, or of the occurrence of the event or circumstance upon which in accordance with the provisions of any memorandum of encumbrance the annuity or sum of money thereby secured shall cease to be payable, and upon proof that all arrears of the said annuity and interest or money have been paid satisfied or discharged, the Registrar General shall make an entry in the Register Book noting that such annuity or sum of money is satisfied and discharged, and shall cancel such instrument, and upon such entry being made the land, estate, or interest shall cease to be subject to or liable for such annuity or sum of money, and the Registrar General shall in any or either such case as aforesaid indorse on the grant, certificate of title, or other instrument evidencing the title of the mortgagor or encumbrancer to the land estate or interest mortgaged or encumbered, a memorandum of the date on which such entry as aforesaid was made by him in the Register Book, whenever such grant, certificate of title, or other instrument shall be presented to him for that purpose.

Entry of satisfaction of annuity.

63. In case the registered mortgagee shall be absent from the Colony and there be no person authorized to give a receipt to the mortgagor for the mortgage money at or after the date appointed for the redemption of any mortgage, it shall be lawful for the Colonial Treasurer to receive such mortgage money with all arrears of interest then due thereon, in trust for the mortgagee or other person entitled thereto, and thereupon the interest upon such mortgage shall cease to run or accrue, and the Registrar General shall upon the receipt of the said Treasurer for the amount of the said mortgage money and interest make an entry in the Register Book discharging such mortgage, stating the day and hour on which such entry is made, and such entry shall be a valid discharge for such mortgage and shall have the same force and effect as is hereinbefore given to a like entry when made upon production of the memorandum of mortgage with the receipt of the mortgagee; and the Registrar General shall endorse on the grant, certificate of title, or other instrument as aforesaid, and also on the memorandum of mortgage, whenever those instruments shall be brought to him for that purpose, the several particulars hereinbefore directed to be endorsed upon each of such instruments respectively.

Mortgage money may be paid to Colonial Treasurer if mortgagee be absent from the Colony and mortgage discharged.

64. In every memorandum of mortgage there shall be implied against the mortgagor a covenant that he will repair and keep in repair all buildings or other improvements erected and made upon the land, and that the mortgagee may at all convenient times until such mortgage be redeemed be at liberty with or without surveyors or others to enter into and upon such land to view and inspect the state of repair of such buildings or improvements.

Covenants to be implied in every memorandum of mortgage.

65. Such of the covenants hereinafter set forth, as shall be expressed in any memorandum of lease or mortgage as to be implied, shall if expressed in the form of words hereinafter appointed and prescribed for the case of each such covenant respectively, be so implied as fully and effectually as if such covenants were set forth fully and in words at length in such instrument, that is to say, the words "will insure" shall imply as follows—that the lessee or mortgagor will insure and, so long as the principal money and interest secured by mortgage shall remain unpaid, or the term expressed in the said mortgage or lease shall not have expired, will keep insured, in the

Abbreviated forms of words for covenants.

Insure.

REAL PROPERTY.

name of such mortgagee or lessor in some public insurance office to be approved by such mortgagee or lessor, against loss or damage by fire to the full amounts specified in such instrument, or if no amount be specified then to their full value, all buildings, tenements, or premises erected on such land which shall be of a nature or kind capable of being insured against loss or damage by fire, and that the mortgagor or lessee will at the request of the mortgagee or lessor hand over to and deposit with him the policy of every such insurance, and produce to him the receipt or receipts for the annual or other premiums payable on account thereof, and also that all moneys to be received under or by virtue of any such insurance shall, in the event of loss or damage by fire, be laid out and expended in making good such loss or damage, provided also that if default shall be made in the observance or performance of the covenant last above mentioned it shall be lawful for the mortgagee or lessor without prejudice nevertheless to and concurrently with the powers granted him by his memorandum of mortgage or lease or by this Act provided, to insure such building, and the costs and charges of such insurance shall, until such mortgage be redeemed or such lease shall have expired, be a charge upon the said land recoverable in like manner as rent or interest in arrear. The words "paint outside every alternate year" shall imply as follows viz.—and also will in every alternate year during the currency of such lease paint all the outside woodwork and ironwork belonging to the hereditaments and premises mentioned in such lease with two coats of proper oil-colours in a workmanlike manner. The words "paint and paper inside every third year" shall imply as follows viz.—and will in every third year during the currency of such lease paint the inside wood, iron, and other works now or usually painted, with two coats of proper oil-colours in a workmanlike manner, and also re-paper with paper of a quality as at present, such parts of the said premises as are now papered, and also wash, stop, whiten, or colour such parts of the said premises as are now whitened or coloured respectively. The words "will fence" shall imply as follows viz.—and also will during the continuance of the said lease, erect and put up on the boundaries of the land therein mentioned or upon such boundaries upon which no substantial fence now exists a good and substantial fence. The word "cultivate" shall imply as follows viz.—and will at all times during the said lease cultivate, use, and manage all such parts of the land therein mentioned as are or shall be broken up or converted into tillage, in a proper and husbandmanlike manner, and will not impoverish or waste the same. The words "that the lessee will not use the said premises as a shop" shall imply as follows viz.—and also that the said lessee will not convert, use, or occupy the said hereditaments and premises mentioned in such lease or any part thereof into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or permit or suffer the said hereditaments and premises or any part thereof to be used for any such purpose, or otherwise than as a private dwelling-house, without the consent in writing of the said lessor. The words "will not carry on offensive trades" shall imply as follows—and also that no noxious, noisome, or offensive art, trade, business, occupation, or calling, shall at any time during the said term be used, exercised, carried on, permitted, or suffered in or upon the said hereditaments and premises above mentioned, and that no act, matter, or thing whatsoever, shall at any time during the said term be done in or upon the said hereditaments and premises, or any part thereof, which shall or may be, or grow, to the annoyance, nuisance, grievance, damage, or disturbance of the occupiers or owners of the adjoining lands and hereditaments. The words "will not without leave assign or sublet" shall imply as follows viz.—and also that the said lessee shall not nor will during the term of such lease assign, transfer, demise, sublet, or set over, or otherwise by any act or deed procure the lands or premises therein mentioned or any of them or any part thereof to be assigned, transferred, demised, sublet or set over unto any person whomsoever, without the consent in writing of the said lessor first had and obtained. The words "will not cut timber" shall imply as follows—and also that the said lessee shall not nor will cut down, fell, injure, or destroy any growing or living timber, or timber-like trees standing and being upon the said hereditaments and premises above mentioned without the consent in writing of the said lessor. The words "will carry on the business of a publican and conduct the same in an orderly manner" shall imply as follows viz.—and also that the said lessee will at all times during the currency of such lease, use, exercise, and carry on, in and upon the premises therein mentioned, the trade or business of a licensed victualler or publican and retailer of spirits, wines, ale, beer, and porter, and keep open and use the messuage, tenement, or inn and buildings standing and being upon the said land, as and for an inn or public-house for the reception, accommodation, and entertainment of travellers, guests, and other persons resorting thereto, or frequenting the same, and manage and conduct such trade or business in a quiet and orderly manner, and will not do, commit, or permit, or suffer to be done or committed, any act, matter, or thing whatsoever, whereby or by means whereof any license shall or may be forfeited or become void or liable to be taken away, suppressed, or suspended in any manner howsoever. The words "will apply for renewal of license" shall imply as follows, viz.—and also shall and will from time to time during the continuance of the said term, at the proper times for that purpose, apply for and endeavour to obtain at his

Paint outside.

Paint and paper inside.

Fence.

Cultivate.

Not use as a shop.

Offensive trades.

Assign or sublet.

Cut timber.

Business of publican in orderly manner.

Apply for renewal of license.

own expense, all such licenses as are or may be necessary for carrying on the said trade or business of a licensed victualler or publican, in and upon the said hereditaments and premises, and keeping the said messuage, tenement, or inn, open as and for an inn or public-house as aforesaid. The words "will facilitate the transfer of license" shall imply as follows, viz.—and also shall and will at the expiration or other sooner determination of the said lease, sign and give such notice or notices and allow such notice or notices of a renewal or transfer of any license as may be required by law to be affixed to the said messuage, tenement, or inn, to be thereto affixed and remain so affixed during such time or times as shall be necessary or expedient in that behalf, and generally to do and perform all such further acts, matters, and things, as shall be necessary to enable the said lessor or any other person authorized by him to obtain the renewal of any license, or any new license, or the transfer of any license then existing and in force.

Facilitate the transfer of license.

66. The Registrar General shall not make any entry in the register book of any notice of trusts, whether expressed, implied, or constructive, but trusts may be declared by any instrument or deed which instrument or deed may include as well lands under the provisions of this Act, as land which is not under the provisions thereof. Provided that the description of the several parcels of land contained in such instrument or deed shall sufficiently distinguish the land which is under the provisions of this Act, from the land which is not under the provisions thereof, and a duplicate or an attested copy of such instrument may be deposited with the Registrar General for safe custody and reference, but shall not be registered.

No notice of trusts to be entered in register book.

Instrument declaring trusts may be deposited but not registered.

67. Upon the transfer of any land, estate, or interest, under the provisions of this Act, to two or more persons as joint proprietors to be held by them as trustees, it shall be lawful for the transferee to insert in the memorandum of transfer or other instrument the words "no survivorship," and the Registrar General shall in such case include such words in the memorial of such instrument, to be entered by him in the register book as hereinbefore directed, and shall also enter the said words upon any certificate of title issued to such joint proprietors pursuant to such memorandum of transfer. And any two or more persons registered as joint proprietors of any land, estate, or interest under the provisions of this Act, held by them as trustees, may by writing under their hand authorize the Registrar General to enter the words "no survivorship" upon the grant, certificate of title, or other instrument evidencing their title to such estate or interest, and also upon the duplicate of such instrument in the register book, or filed in his office, and after such entry has been made and signed by the Registrar General in either such case as aforesaid, it shall not be lawful for any less number of joint proprietors than the number then registered, to transfer or otherwise deal with the said land, estate, or interest without obtaining the sanction of the Supreme Court or a Judge thereof.

How survivorship among trustees may be barred except on Judge's order.

68. Before making any such order as aforesaid, the Court or Judge shall if it seem requisite cause notice of intention so to do to be advertised once in the *Gazette*, and three times in at least one newspaper published in Sydney, and shall appoint a period of time within which it shall be lawful for any person interested to show cause why such order should not be issued, and thereupon it shall be lawful for the said Court or Judge in such order to give directions for the transfer of such land, estate, or interest, to any new proprietor or proprietors solely or jointly, with or in the place of any existing proprietor, or to make such order in the premises as the Court thinks just, for the protection of the persons beneficially interested in such land, estate, or interest, or in the proceeds thereof, and upon such order being deposited with the Registrar General he shall make such entries and perform such acts as in accordance with the provisions of this Act may be necessary for the purpose of giving effect to such order.

Notice to be published before order.

69. The registered proprietor of any land, estate, or interest under the provisions of this Act, may authorize and appoint any person to act for him or on his behalf in respect to the transfer or other dealing with such land, estate, or interest in accordance with the provisions of this Act, by executing a power in any form heretofore in use for the like purpose, or in form I of the Schedule hereto, and such power of attorney or a duplicate or certified copy thereof shall be filed in the office of the Registrar General, who shall enter in the register book a memorandum of the particulars therein contained and the date and hour when it was so filed.

Powers of attorney.

70. The Registrar General, upon the application of any registered proprietor of land under the provisions of this Act, shall grant to such proprietor a registration abstract in the form K of the Schedule hereto enabling him to transfer or otherwise deal with his estate or interest in such land at any place without the limits of the Colony, and shall at the same time enter in the register book a memorandum recording the issue of such registration abstract, and shall indorse on the grant, certificate of title, or other instrument evidencing the title of such applicant proprietor, a like memorandum, and from and after the issuing of any such registration abstract, no transfer or other dealing in any way affecting the estate or interest in respect of which such registration abstract is issued, shall be entered in the register book, until such abstract shall have been surrendered to the Registrar General to be cancelled, or the loss or destruction of such abstract proved to his satisfaction.

Registration abstract for registering dealings without the limits of the Province.

Mode of procedure under registration abstract.

71. Whenever any transfer or other dealing is intended to be transacted under any such registration abstract, a memorandum of transfer or such other instrument as the case may require shall be prepared in duplicate, in form hereinbefore appointed, and shall be produced to some one of the persons hereinafter appointed as persons before whom the execution of instruments without the limits of the Colony may be proved, and upon memorial of such instrument being entered upon the registration abstract, and authenticated by the signature of such authorized person as aforesaid in manner hereinbefore directed for the entry of memorials in the register book, such instrument shall be held to be registered, and such transfer or other dealing shall be as valid and binding to all intents as if the same had been entered in the register book by the Registrar General, and whenever a memorial of any instrument which has not been indorsed upon the instrument evidencing title to the estate or interest intended to be dealt with has been entered upon the registration abstract, such authorized person as aforesaid shall record the like memorial on the duplicate grant, certificate of title, lease, or other instrument evidencing title as aforesaid, and the certificate of registration indorsed on the instrument of which the memorial has been so entered and signed by such authorized person and sealed with his seal, shall be received in all Courts of Law or Equity as conclusive evidence that such instrument has been duly registered.

Proceeding upon delivery of registration abstract to the Registrar General,

72. Upon the delivery of any registration abstract to the Registrar General, he shall record in the register book, in such manner as to preserve their priority, the particulars of every transfer or other dealing recorded thereon, and shall file in his office the duplicates of every memorandum of transfer or other instrument executed thereunder, which may for that purpose be delivered to him, and shall cancel such abstract and note the fact of such cancellation in the register book, and if a freehold estate in such land or in any part thereof be transferred, the grant or certificate of title shall be delivered up to the Registrar General who shall thereupon proceed as is herebefore directed for the case of the transfer of an estate of freehold.

Procedure when registration abstract is lost.

73. Upon proof at any time to the satisfaction of the Registrar General, that any registration abstract is lost, or so obliterated as to be useless, and that the powers thereby given have never been exercised, or if they have been exercised, then upon proof of the several matters and things that have been done thereunder, it shall be lawful for the Registrar General, as circumstances may require, either to issue a new registration abstract as the case may be, or to make such entries in the register book, or do such acts as might have been made or done if no such loss or obliteration had taken place.

Revocation of power of attorney.

74. The registered proprietor of any land in respect of which a power of attorney has been executed, may for the purpose of revoking such power, execute an instrument in the form L of the Schedule hereto, or in any form heretofore in use for the like purpose, and the Registrar General shall, except in any case where a registration abstract is outstanding, enter the particulars thereof in the register book, and record thereon the date and hour in which such entry was made, and shall file the same in his office, and after the date of such entry the Registrar General shall not give effect to any memorandum of transfer or other instrument executed pursuant to such power of attorney.

PART V.—*Transmissions.*

Transmission by bankruptcy or insolvency.

75. Upon the bankruptcy or insolvency of the registered proprietor of any land, estate, or interest under the provisions of this Act, the assignees of such bankrupt or insolvent shall be entitled to be registered as proprietors in respect of the same, and the Registrar General upon the receipt of an office copy of the appointment of such assignees, accompanied by an application in writing under their hand to be so registered in respect to any land estate or interest of such bankrupt or insolvent therein specified and described, shall enter in the register book upon the folium constituted by the grant or certificate of title of such land, a memorandum notifying the appointment of such assignees, and upon such entry being made such assignees shall be deemed and taken to be registered proprietors of the estate or interest of such bankrupt or insolvent, in such land, and shall hold the same subject to the equities upon and subject to which the bankrupt or insolvent held the same, but for the purpose of any dealings with such land, estate, or interest, under the provisions of this Act, such assignees shall be deemed to be absolute proprietors thereof.

Upon entry of appointment assignees to be deemed proprietors. But subject to equities.

Mortgagee of the leasehold interest of an insolvent may be entered as transferee of lease.

76. Upon the bankruptcy or insolvency of the registered proprietor of any lease subject to mortgage under the provisions of this Act, the Registrar General, upon the application in writing of the mortgagee, accompanied by a statement in writing signed by the assignees of such bankrupt or insolvent certifying their refusal to accept such lease, shall enter in the register book the particulars of such refusal, and such entry shall operate as a foreclosure, and the interest of the insolvent in such lease shall thereupon vest in such mortgagee, and if such mortgagee shall neglect or decline to make such application as aforesaid, the Registrar General, upon application by the lessor and proof of such neglect or refusal and of the matters aforesaid, shall enter in the register book notice of such neglect or refusal of such assignee to accept such lease, and such entry shall operate as a surrender of such lease.

77. The Registrar General, upon the production of the register or other sufficient proof of the marriage of a female registered proprietor of any land, estate, or interest under the provisions of this Act, accompanied by an application in writing signed by such female proprietor to that effect, shall enter on the register book and also upon the certificate of title or other instrument evidencing the title of such female proprietor when produced to him for that purpose, the name and description of her husband, the date of the marriage and where solemnized, the day and hour of the production to him of the register or other sufficient evidence of such marriage, and the husband of such female proprietor shall unless such land be held for her separate use be entitled to be registered as co-proprietor of such land in right of his wife, and the Registrar General upon application to that effect, and surrender of the existing certificate of title, shall comply with such application.

Marriage of female proprietor to be certified to the Registrar General.

Particulars to be entered in register book and on the instrument evidencing title.

78. Whenever any mortgage, encumbrance, or lease affecting land under the provisions of this Act shall be transmitted in consequence of the will or intestacy of the registered proprietor thereof, probate or an office copy of the will of the deceased proprietor or letters of administration or the order of the Supreme Court authorizing the Curator of Intestate Estates to administer the personal estate of the deceased proprietor of such estate or interest as the case may be, accompanied by an application in writing from the executor, administrator, or curator claiming to be registered as proprietor in respect of such estate or interest, shall be produced to the Registrar General who shall thereupon enter in the register book and on the lease or other instrument evidencing title to the estate or interest transmitted, the date of the will and of the probate or of the letters of administration or order of the Supreme Court as aforesaid, the date and hour of the production of the same to him, the date of the death of such proprietor when the same can be ascertained, with such other particulars as he may deem necessary, and upon such entry being made the executors or administrators or the Curator of Intestate Estates as the case may be, shall be deemed to be registered proprietors or proprietor of such mortgage, encumbrance, or lease, and the Registrar General shall note the fact of such registration by memorandum under his hand on the letters of administration, probate, or other instrument as aforesaid.

Transmission of mortgage or lease on death of proprietor.

Will or probate or letters of administration or order of Court to be produced.

79. The heir-at-law, devisee, tenant by the courtesy, or other person claiming any estate of freehold in the land of a deceased proprietor, may make application in writing to the Registrar General to be registered as proprietor of such estate, and shall deposit with him the certificate of the death, the will or an office copy or probate of the will of the deceased proprietor, or any settlement under which such applicant claims, or in the case of intestacy such evidence of heirship as he may be enabled to produce, and such application shall state the nature of every estate or interest held by other persons at law or in equity in such land within the applicant's knowledge, and that he verily believes himself to be entitled to the estate in such land in respect to which he applies to be registered, and the statements made in such application shall be verified by the oath or statutory declaration of such applicant: Provided always that the heir-at-law, devisee, or other person making such application shall surrender the existing grant or certificate of title of the land in respect to which he claims to be registered as proprietor, prior to his being entered in the register book as hereinafter mentioned.

Heir-at-law or devisee may apply to Registrar General to be registered as proprietor of the land.

80. The Registrar General shall refer such application to the Examiners for examination and report, and thereafter shall submit the same for the consideration of the Commissioners, who may either reject such application altogether, or direct the Registrar General to cause notice thereof to be published once in the *Gazette*, and three times in at least one daily newspaper published in Sydney, and to give such further publicity to such application as they may direct, whether by advertisement, or the serving or posting of notices, and shall limit and appoint a time not less than one month from the date of the advertisement in such *Gazette*, upon or after which the Registrar General may, unless he shall in the interval have received a caveat forbidding him so to do, register such applicant as proprietor of such land by entering in the register book the particulars of the transmission through which such applicant claims, and by issuing to such applicant a certificate of title for the land so transmitted and the Commissioners may direct any caveat to be entered by the Registrar General for the protection of the interests of such other persons (if any) as may be interested in such land: Provided always that the person registered consequent on such direction of the Commissioners, or any executor or administrator, or the Curator of Intestate Estates when registered in respect of any mortgage, encumbrance, or lease, shall hold such land, estate, or interest, in trust for the persons and purposes to which it is applicable by law, but for the purposes of any dealing with such land estate or interest under the provisions of this Act, he shall be deemed to be absolute proprietor thereof.

Application to be referred to Examiners and the Commissioners.

Notice thereof published after.

Applicant may be registered.

But to hold subject to any trusts.

PART VI.—General Provisions.

81. Any settlor of land under the provisions of this Act transferring such land to be held by the transferee as trustee, or any beneficiary or other persons claiming estate or interest in such land under any unregistered instrument, or by devolution in law or

Caveat may be lodged.

otherwise, may by caveat in the form M of Schedule hereto forbid the registration of any instrument affecting such land, estate, or interest, either absolutely or until after notice of the intended dealing given to the caveator, as may be required and enjoined in such caveat, and every such caveat shall state the name and address of the person by whom or on whose behalf the same is lodged, and shall contain a sufficient description to identify the land and the estate or interest therein claimed by the caveator or by the person on whose behalf the caveat is lodged, and except in case of caveats lodged by order of the Supreme Court or by the Registrar General as hereinbefore provided, shall be signed by the caveator or by his solicitor, known agent, or attorney, and every notice relating to such caveat or to any proceedings in respect thereof, if served at the address mentioned in such caveat or at the office of the solicitor, known agent, or attorney who may have signed the same, shall be deemed to be duly served, and every such caveat may be withdrawn by the caveator.

And may be withdrawn.

Notice of caveat.

Caveator to show cause.

When caveat to lapse.

No registry affecting lands while caveat in force.

Compensation for lodging caveat without reasonable cause.

Proprietor may vest estate jointly in himself and others without limiting any use or executing any assignment.

82. Upon the receipt of such caveat the Registrar General shall notify the same to the person against whose application to bring land under the provisions of this Act or to be registered as proprietor or as the case may be, to the registered proprietor against whose title to deal with land under the provisions of this Act such caveat has been lodged, and such applicant proprietor or registered proprietor may if he think fit summon the caveator or the person on whose behalf such caveat has been lodged to attend before the Supreme Court or a Judge thereof, to show cause why such caveat should not be removed, and it shall be lawful for such Court or Judge upon proof that such person has been summoned to make such order in the premises, either *ex parte* or otherwise, as to such Court or Judge may seem fit. And except in the case of a caveat lodged by a settlor, or by or on behalf of a beneficiary claiming under any will or settlement, or by the Registrar General for the protection of incapable persons, or for the prevention of fraud as hereinbefore prescribed, every such caveat lodged against a registered proprietor shall, unless an order to the contrary be made by the Supreme Court or a Judge thereof, be deemed to have lapsed upon the expiration of fourteen days after notice given to the caveator that such registered proprietor has applied for the registration of any transfer or other dealing with such land estate or interest. ⁽³⁵⁾

83. So long as any caveat shall remain in force prohibiting the transfer or other dealing with land, the Registrar General shall not enter in the register book any memorandum of transfer or other instrument purporting to transfer or otherwise deal with or affect the land estate or interest in respect to which such caveat may be lodged.

84. Any person lodging any caveat with the Registrar General without reasonable cause, shall be liable to make to any person who may have sustained damage thereby, such compensation as may be just, and such compensation shall be recoverable in an action at law by the person who has sustained damage from the person who lodged the caveat.

85. The registered proprietor of any land or of any estate or interest in land under the provisions of this Act, whether of the nature of real or personal property, may by any of the forms of instruments of transfer provided by this Act, modified as may be necessary, transfer such land, estate, or interest, or any part thereof, to his wife, or if such registered proprietor be a married woman it shall be lawful for her to make such transfer to her husband, or it shall be lawful for such registered proprietor to make such transfer to himself jointly with any other person or persons, or to create or execute any powers of appointment, or to limit any estates whether by remainder or otherwise without limiting any use or executing any re-assignment, but upon the registration of such transfer the said land, estate, or interest shall vest in such registered proprietor, jointly with any other person or persons, or in the person taking under such limitation or in whose favour any power may have been executed or otherwise, according to the intent and meaning appearing in such instrument and thereby expressed.

⁽³⁵⁾ M. claiming to be entitled to certain land, but not being in actual occupation thereof, applied to bring it under the provisions of the Real Property Act, 26 Vic. No. 9. B. thereupon lodged a caveat under the 21st section of the Act, in respect of a certain portion of the land, which he alleged had been in his own quiet and peaceable possession for the last 25 years, and also commenced an action in the Supreme Court as directed by section 24, but took no further proceedings therein up to the time of this application—a period of ten months; nor was the summons ever served on M. The Court, under section 82, (Hargrave, J., *dissentiente*) made absolute a rule for the removal of the caveat, unless the caveator proceeded with his action within a reasonable time. *Held* (Hargrave, J., *dissentiente*) that the 82nd section applies to all caveats under the Act; and that the words “such caveat” at the commencement of the section is to be read as if “any caveat.” *Held* (per Hargrave, J.), that the proper course for M. to pursue, was to bring ejectment against B., or apply *de novo* for a certificate of title to the land, leaving out the portion in B's possession. *Semble* (per Faucett, J.), as the summons if issued and not served within six months would be no longer in force (C. L. P. Act, s. 10), the caveat would lapse as if no action had been commenced. *Es parte M'Intosh, in re Barnes*, 10, S. C. R., 146.

86. Two or more persons who may be registered as joint proprietors of an estate or interest in land under the provisions of this Act shall be deemed to be entitled to the same as joint tenants, and shall each receive a separate and distinct certificate of such joint estate marked respectively with the name of the owner to whom the same shall be delivered, and in all cases where two or more persons are entitled as tenants in common to undivided shares of or in any land, such persons shall also receive separate and distinct certificates of title or other instrument evidencing title to such undivided shares.

Registered joint proprietors to be joint tenants.

Tenants in common to receive distinct certificates.

87. When any person is registered as joint proprietor with his wife, of an estate in fee simple in right of his wife, if such person die in the lifetime of his wife and before any transfer of such estate, or if such wife die in the lifetime of her husband and the said husband is entitled as tenant by the courtesy, or upon the death of any person registered together with any other person as joint proprietor of the same estate or interest in any land, or when the life estate in respect to which any certificate of title has been issued has determined, and the estate next registered in remainder or reversion has become vested in possession, or the person to whom such certificate of title has been issued has become entitled to the said land for an estate in fee simple in possession, the Registrar General may, upon the application of the person entitled and proof to his satisfaction of any such occurrence as aforesaid, register such person as proprietor of such estate or interest in manner hereinbefore prescribed for the registration of a like estate or interest upon a transfer or transmission.

Registration of survivor of joint proprietors.

88. Whenever a certificate of title has been issued in respect of a life estate in any land, any person entitled in reversion or remainder to such land, may apply to be registered as so entitled, and the Registrar General shall cause the title of such applicant to be investigated by the Examiners, and thereafter submit the same for consideration by the Commissioners, who may either reject such application altogether, or direct that the applicant be registered forthwith, or be so registered unless caveat be lodged after such notice or advertisement, and within such period as they may appoint, and the Registrar General shall obey such direction or any order of the Supreme Court in the premises.

Remainderman or reversioner may be registered as such.

89. Every covenant and power to be implied in any instrument by virtue of this Act, may be negatived or modified by express declaration in the instrument or indorsed thereon, and in any declaration in an action for a supposed breach of any such covenant, the covenant alleged to be broken may be set forth, and it shall be lawful to allege that the party against whom such action is brought did so covenant precisely in the same manner as if such covenant had been expressed in words in such memorandum of transfer or other instrument, any law or practice to the contrary notwithstanding, and every such implied covenant shall have the same force and effect and be enforced in the same manner as if it had been set out at length in such instrument, and where any memorandum of transfer or other instrument in accordance with the provisions of this Act is executed by more parties than one, such covenants as are by this Act declared to be implied in instruments of the like nature shall be construed to be several, and not to bind the parties jointly.

Implied covenants may be modified or negatived.

90. The Registrar General may, subject to the approval of the Governor with the advice aforesaid, from time to time make such alterations in the several forms of instruments prescribed in the Schedule hereto as he may deem requisite, and shall cause every such form to be stamped with his seal and to be supplied at the General Registry Office free of charge or at such moderate prices as he may from time to time fix, or may license any person to print and sell the same.

Forms of instruments may be altered.

91. The Registrar General, with the consent of the Commissioners in case they shall see reasonable cause for so doing, may dispense with the production of any grant, certificate of title, lease, or other instrument, for the purpose of entering the memorial by this Act required to be entered upon the transfer or other dealing with land under the provisions of this Act, and upon the registration of such transfer or other dealing the Registrar General shall notify in the memorial in the register book that no entry of such memorial has been made on the duplicate grant, or other instrument, and such transfer or other dealing shall thereupon be as valid and effectual as if such memorial had been so entered, and the Registrar General may, with the like consent, dispense with the production of the grant or certificate of title hereinbefore required to be surrendered, prior to the registration of a devisee or heir-at-law upon the transmission of an estate of freehold: Provided always that before registering such transfer, transmission, or other dealing the Registrar General shall in such case require the transferor or other party dealing or deriving, to make an affidavit that such grant or instrument has not been deposited as security for any loan, and shall give at least fourteen days' notice, of his intention to register such dealing, in the *Gazette* and in at least one daily newspaper published in Sydney.

Duplicates of certificates &c. may be dispensed with after notice in certain cases.

92. No writ of *fiat facias* or other writ of execution issued prior to the date on which this Act shall come into operation, or thereafter, shall bind, charge, or affect any land, estate, or interest under the provisions of this Act; but whenever any land or any estate or interest under the provisions of this Act shall be seized or sold by the Sheriff or the Registrar or Bailiff of any District Court under any writ, or shall be sold under any direction, decree, or order of the Supreme Court or District Court, or whenever

Sale by Sheriff or under order of Supreme Court.

any order of such Court shall be made authorizing the Curator of Intestate Estates to take the charge of the real estate of a deceased proprietor, the Registrar General on being served with an office copy of the writ, direction, decree, or order as the case may be shall enter in the register book and also upon the instrument evidencing title to the said estate or interest, if produced for that purpose, the date of the said writ, direction, decree, or order, and the date and hour of the production thereof, and after such entry as aforesaid the Sheriff or person authorized by the Supreme Court, or the Registrar or Bailiff of any District Court shall do such acts and execute such instruments as under the provisions of this Act may be necessary to transfer or otherwise to deal with the said estate or interest: Provided always that unless and until such entry has been made as aforesaid, no such writ shall bind or affect any land under the provisions of this Act, or any estate or interest therein, nor shall any sale or transfer by the Sheriff, Registrar, or Bailiff be valid as against a purchaser or mortgagee, notwithstanding such writ may have been actually in the hands of the Sheriff, Registrar, or Bailiff at the time of any purchase or mortgage, or notwithstanding such purchaser or mortgagee may have had actual or constructive notice of the issue of such writ, and upon production to the Registrar General of sufficient evidence of the satisfaction of any writ so entered as aforesaid, he shall enter in the register book a memorandum to that effect, and such writ shall be deemed to be satisfied accordingly, and every such writ shall be deemed to have lapsed unless the same shall be executed and put in force within three months from the day on which it was entered in the register book as aforesaid.

Seal of Corporation substituted for signature.

Instruments how attested and before whom proved.

Mode of proving instruments.

93. A Corporation for the purpose of transferring or otherwise dealing with land under the provisions of this Act, in lieu of signing the proper instrument for such purpose prescribed, may affix thereto the common seal of such Corporation, with a certificate that such seal was affixed by the proper officer verified by his signature.

94. Instruments executed pursuant to the provisions of this Act, if attested by one witness, shall be held to be duly attested, and the execution thereof may be proved if the parties executing the same be resident within the Colony then before the Registrar General or before a Notary Public, Justice of the Peace, or a Commissioner for taking Affidavits, if the said parties be resident in the United Kingdom then before the Mayor or other chief officer of any Corporation or before a Notary Public, if the said parties be resident in any British Possession then before the Registrar General or Recorder of Titles of such Possession, or before any Judge or Notary Public, or before the Governor, Government Resident, or Chief Secretary thereof, and if the said parties be resident at any foreign place then before the British Consular Officer resident at such place.

95. The execution of any such instrument may be proved before any such person as aforesaid by the oath or statutory declaration of the parties executing the same, or of a witness attesting the signing thereof, and if such witness shall answer in the affirmative each of the questions following that is to say—

Are you the witness who attested the signing of this instrument and is the name or mark purporting to be your name or mark as such attesting witness your own handwriting?

Do [*or did*] you personally know the person signing this instrument and whose signature you attested?

Is the name purporting to be his signature his own handwriting—is he [*or was he when he so executed*] of sound mind—and did he freely and voluntarily sign the same?

Then the Registrar General Justice or other person before whom such witness shall prove such signature as aforesaid shall indorse upon such instrument a certificate in form N of the Schedule hereto, and if the person executing such instrument be personally known to the Registrar General, Justice, or other person as aforesaid, and alive and in the Colony, he may attend and appear before such Registrar General, Justice, or other person and acknowledge that he did freely and voluntarily sign such instrument, and upon such acknowledgment the Registrar General, Justice, or other person shall indorse on such instrument a certificate in form O of the Schedule hereto; provided, that such questions as aforesaid may be varied as circumstances may require in case any person shall sign such instrument by his mark.

How acknowledgment of married women to be taken.

96. The Registrar General shall not register any instrument signed by any married woman purporting to transfer or otherwise to deal with any land under the provisions of this Act in respect to which she may be registered as proprietor either solely or jointly with her husband, in her right, until such married woman shall have been examined apart from her husband by the Registrar General or other person legally authorized to take the acknowledgments of married women, and shall have assented to such proposed dealing; after full explanation of her rights in the land and of the effect of the proposed dealing, and the Registrar General or other persons taking such acknowledgment, shall indorse on the instrument of transfer or other dealing a certificate of such acknowledgment and examination and the date and hour thereof.

Upon surrender of existing grants or certificates

97. Upon the application of any registered proprietor of land held under separate grants or certificates of title, or under one grant or certificate, and the delivering up of

such grant or grants, certificate or certificates of title, it shall be lawful for the Registrar General to issue to such proprietor a single certificate of title for the whole of such land, or several certificates each containing portion of such land, in accordance with such application and as far as the same may be done consistently with any regulations at the time in force respecting the parcels of land that may be included in one certificate of title, and upon issuing any such certificate of title, the Registrar General shall cancel the grant or previous certificate of title of such land so delivered up, and shall endorse thereupon a memorandum setting forth the occasion of such cancellation and referring to the certificate of title so issued.

proprietor may obtain a single certificate or vice versa.

98. In the event of the grant or certificate of title of land under the provisions of this Act being lost, mislaid, or destroyed, the proprietor of such land together with other persons if any having knowledge of the circumstances may make a declaration before the Registrar General, or before any of the persons hereinbefore appointed as persons before whom the execution of instruments may be proved, stating the facts of the case, the names and descriptions of the registered owners, and the particulars of all mortgages, encumbrances, or other matters affecting such land and the title thereto, to the best of declarant's knowledge and belief, and the Registrar General if satisfied as to the truth of such declaration and the *bond fides* of the transaction may with the consent of the Commissioners issue to such applicant a provisional certificate of title of such land which provisional certificate shall contain an exact copy of the original grant or certificate of title bound up in the register book and of every memorandum and indorsement thereon and shall also contain a statement of the circumstances under which such provisional certificate is issued, and the Registrar General shall at the same time enter in the register book notice of the issuing of such provisional certificate and the date thereof, and the circumstances under which it was issued, and such provisional certificate shall be available for all purposes and uses for which the grant or certificate of title so lost or mislaid would have been available, and as valid to all intents as such lost grant or certificate: Provided always that the Registrar General before issuing such provisional certificate shall give at least fourteen days' notice of his intention so to do in the *Gazette*, and in at least one daily newspaper published in Sydney.

Provision in case of lost grant.

99. Upon the production of the receipt of the Colonial Treasurer in full for the purchase money of any lands alienated in fee from the Crown, together with a memorandum of transfer, mortgage, or lease duly executed by the purchaser from the Crown of such land, the Registrar General shall endorse upon such receipt such memorial as he is hereinbefore required to enter in the register book upon the registration of any dealing of a like nature with land in respect to which a grant or certificate of title has been registered, and shall sign such indorsement and stamp the same with his seal, and such instrument shall thereupon be held to be duly registered in accordance with the provisions of this Act, and the Registrar General shall file such receipt and such instrument in his office, and upon the registration of the grant of such land the Registrar General shall enter thereon a memorial of such dealing, and shall indorse such instrument with the certificate of registration as hereinbefore prescribed for the registration of instruments generally.

Dealings may be registered prior to the issue of grant from the Crown.

100. Any proprietor subdividing any land under the provisions of this Act for the purpose of selling the same in allotments as a township, shall deposit with the Registrar General a map of such township, provided that such map shall exhibit distinctly delineated all roads, streets, passages, thoroughfares, squares, or reserves appropriated or set apart for public use, and also all allotments into which the said land may be divided marked with distinct numbers or symbols, and every such map shall be certified as accurate by declaration of a licensed surveyor before the Registrar General or a Justice of the Peace: Provided that no person shall be permitted to practise as a surveyor under the provisions of this Act unless specially licensed for that purpose by the Surveyor General.

Map of subdivided land.

101. The Registrar General may require the proprietor applying to have any land brought under the provisions of this Act, or desiring to transfer or otherwise to deal with the same or any portion thereof, to deposit at the Registry Office a map or plan of such land, certified by a licensed surveyor in manner aforesaid, and if the said land or the portion thereof proposed to be transferred or dealt with shall be of less area than one statute acre, then such map or plan shall be on a scale of not less than one inch to two chains, and if such land or the portion thereof about to be transferred or dealt with shall be of greater area than one statute acre but not exceeding five statute acres, then such map shall be upon a scale not less than one inch to five chains, and if such land or the portion thereof as aforesaid shall be of greater area than five statute acres but not exceeding eighty statute acres, then such map or plan shall be upon a scale of not less than one inch to ten chains, and if such land or the portion thereof as aforesaid shall be of greater area than eighty statute acres then such map or plan shall be upon a scale of one inch to twenty chains, and if such proprietor shall neglect or refuse to comply with such requirement it shall not be incumbent on the Registrar General to proceed with the bringing of such land under the provisions of this Act or with the registration of such transfer or lease: Provided always that subsequent subdivisions of the same land may be delineated on the map or plan of the same so deposited if such map be upon a

Surveyors to be licensed.

Registrar General may require map to be deposited.

sufficient scale in accordance with the provisions herein contained, and the correctness of the delineation of each such subdivision shall be acknowledged in manner prescribed for the case of the deposit of an original map.

Certified copies to be furnished by Registrar General and to be evidence.

102. The Registrar General upon payment of the fee specified in the Schedule P hereto shall furnish to any person applying for the same a certified copy of any registered instrument affecting land under the provisions of this Act, and every such certified copy signed by him and sealed with his seal shall be received in evidence in any Court of Justice, or before any person having by law or by consent of parties authority to receive evidence, as *prima facie* proof of all the matters contained or recited in or indorsed on the original instrument.

Searches.

103. Any person may upon payment of a fee specified in Schedule P hereto have access to the register book for the purpose of inspection during the hours and upon the days appointed for search.

Authority to register.

104. The Registrar General shall not receive any application for bringing land under the provisions of this Act, or any instrument purporting to deal with or affect any land under the provisions of this Act, unless there shall be endorsed thereon a certificate that the same is correct for the purposes of this Act, signed by the applicant or party claiming under or in respect of such instrument or by his solicitor, and any person who shall falsely or negligently certify to the correctness of any such application or other instrument shall incur therefor a penalty not exceeding fifty pounds: Provided always that such penalty shall not prevent the person who may have sustained any damage or loss in consequence of error or mistake in any such certified instrument or any duplicate thereof from recovering damages against the person who shall have certified the same.

Penalty for certifying incorrect instruments.

Fees.

105. It shall be lawful for the Registrar General to recover such fees as shall be appointed by the Governor with the advice aforesaid, not in any case exceeding the several fees specified in the Schedule hereto marked P.

Registrar General to pay moneys into Treasury and to render accounts.

106. The Registrar General shall keep a correct account of all such sums of money as shall be received by him in accordance with the provisions of this Act, and shall pay the same to the Colonial Treasurer at such times, and shall render accounts of the same to such persons, and in such manner, as may be directed in any regulations that may for that purpose be prescribed by the Governor with the advice aforesaid; and the Registrar General shall address to the said Treasurer requisitions to pay moneys received by him or by the said Treasurer in trust or otherwise on account of absent mortgagees or other persons entitled in accordance with the provisions of this Act, which requisitions when proved and audited in manner directed by any such regulations framed as aforesaid at the time being in force in the said Colony, and accompanied by warrant for payment of the same under the hand of the Governor, countersigned by the Chief Secretary thereof, the said Treasurer shall be bound to obey, and all fines and fees received under the provisions of this Act except fees payable to the Commissioners for the bringing of land under the operation of this Act shall be carried by the said Treasurer to account of the Consolidation Revenue Fund.

Parties entitled to be paid by Treasurer upon proper warrant.

PART VII.—*Rights Remedies and Procedure.*

Proprietor may summon Registrar General to show cause if dissatisfied.

107. If upon the application of any proprietor to have land brought under the provisions of this Act, or to have any dealing or transmission registered or recorded, or to have any certificate of title, registration abstract, foreclosure order, or other instrument issued, or to have any act or duty done or performed which by this Act is prescribed to be done or performed by the Registrar General, the Registrar General shall refuse so to do, or if such proprietor shall be dissatisfied with the direction upon his application given by the Commissioners as hereinbefore provided, it shall be lawful for such proprietor to require the Registrar General to set forth in writing under his hand the grounds of his refusal or the grounds, upon which such direction was given, and such proprietor may if he think fit at his own costs summon the Registrar General to appear before the Supreme Court to substantiate and uphold the grounds of his refusal or of such direction as aforesaid, such summons to be issued under the hand of a Judge of the said Court and served upon the Registrar General six clear days at least before the day appointed for hearing the complaint of such proprietor, and upon such hearing the Registrar General or his counsel shall have the right of reply, and the said Court shall if any question of fact be involved direct an issue to be tried to decide such fact, and the said Court shall thereupon make such order in the premises as in their judgment the circumstances of the case may require, and the Registrar General shall obey such order, and all expenses attendant upon any such proceedings shall be borne and paid by the applicant or other person preferring such complaint, unless the Judge or Court shall certify that there were no probable grounds for such refusal or direction as aforesaid. ⁽³⁴⁾

⁽³⁴⁾ Application to bring three properties, situate respectively in Pitt-street, Sydney, Redfern, and Vaucluse, under the Real Property Act, declined by the Land Titles Commissioners. On a motion under section 107, to compel them to entertain said application, it was held that every application to bring land under the provisions of the

108. It shall be lawful for the Registrar General, by direction of the Commissioners, whenever any question shall arise with regard to the performance of any duties or the exercise of any of the functions by this Act conferred or imposed upon him or them, to state a case for the opinion of the Supreme Court and thereupon it shall be lawful for the said Court to give its judgment thereon and such judgment shall be binding upon the Registrar General and Commissioners respectively.

Registrar General may state a case for Supreme Court.

109. Whenever any person interested in land under the provisions of this Act shall appear to the Supreme Court to be a trustee of such land within the intent and meaning of any Trustee Act then in force in the Colony, and any order shall be made in the premises by the Court or a Judge thereof, the Registrar General on being served with an

Registrar General to carry out order of Supreme Court vesting trust estate.

said Act must be confined to one block or contiguous track. It was contended on applicant's behalf that the Registrar General had no power to make the Rules of June 1st, 1863, which forbade the reception of his application. And Stephen, C.J., and Milford, J., seemed to think that no power to make these rules had been conferred by the statute; the former, however, thinking that as an expression of law the rules were correct. *Ex parte Burnell and another*, 3, S.C.R., p. 148.

The Registrar General having, under the Real Property Act, 26 Vic. No. 9, issued a certificate of title, with a clause endorsed thereon, reserving, or purporting to reserve, "any lawful rights incident to the alignment of streets or roads abutting on the land," the Court (Stephen, C.J., *dissentiente*) directed the Registrar General to cancel such certificate, and to issue a new certificate in the same terms but without such a clause. *Ex parte Smart*, 6, S.C.R., p. 188.

A testator devised and bequeathed to trustees his real and personal estate, to hold the same upon trust to pay his debts; and in case the personal estate should be insufficient, he authorized the trustees and their heirs to sell such part of the real estate as should be necessary for that purpose—also, upon trust, to let for the best rent such part of the real estate as should not be sold, until the testator's son should attain the age of 21 years. The testator directed that the rents of the real estate, or so much as should be necessary was to be applied towards the maintenance of his son until he should have attained 21 years of age, and then the trustees were to hold the land upon trust, to permit and suffer the son to enter upon, occupy, and enjoy the said real estate, and receive and take the rents and profits thereof, during the term of his natural life, to and for his own proper use and benefit. Testator then declared that the son should have power to let the real estate for any term not exceeding 21 years, and upon the son's death the testator then devised the said real estate as follows:—Unto the heirs of the body of him, my said son, lawfully to be begotten, whether male or female, share and share alike, as tenants in common (if more than one), and to their several and respective heirs and assigns for ever. And the trustees were directed to convey, assure, transfer, and pay the same to them, him, or her accordingly. *Held*, that the legal estate was in the trustees until the son attained the age of 21 years. Upon the son attaining that age, he took the legal estate in all the land then unsold; and upon the death of the son, the legal estate passed at once by operation of law to the heirs of his body; also *held*, as both limitations were legal, the rule in *Shelley's case* applied, and the estate of the son was one of inheritance. *Held* also, *per* Sir J. Martin, C.J. (following *Vesson v. Wright*, 2 Bligh 1), that in a devise such as this, the words after the words "heirs of the body" must be rejected as being repugnant to the estate which these words properly and technically created. *Held* also, *per* Hargrave, J. (following *Doe, d. Cowper v. Hicks*, 7, T.R., 493), that clear words of devise in a will cannot be cut down by subsequent ambiguous words. *Ex parte Willis and others*, 12, S.C.R., 312.

James Underwood, by his will, devised his real estate in certain specified portions to his five sons and the son of his daughter, for their respective lives, with remainder to their children in equal shares and proportions as tenants in common in tail, with cross remainders between them in tail. Interests, numerous and complicated, arose in the estate by reason of sales or attempted sales, transfers, mortgages, insolvencies, and deaths, and the number of persons claiming shares in the property became so large that the Legislature passed an Act to authorize the sale of the whole of the devised lands for the benefit of all parties interested in it. By the Act, the legal estate was vested in the trustees, who were empowered to sell the lands, &c., and to convey the same to the purchasers in fee; and it was enacted that the said lands, &c., should vest absolutely in the persons to whom they were conveyed, their heirs and assigns, "freed and discharged from any trusts conveyed by the said will." By a second Act the Primary Judge was authorized to appoint two additional trustees. The trustees applied to have portions of the lands devised by the will brought under the provisions of the Real Property Act. The Commissioners rejected the application, on the grounds substantially that it had been ascertained by search in the Registry Office that there were various incumbrances affecting the property which had not been noticed in the application, and that the parties interested in such incumbrances were not parties to the application. Under the 107th section of the Lands Titles Act, the trustees applied to

office copy of such order shall enter in the register book, and on the grant or other instrument evidencing title to the said land, the date of the said order, the date and hour of its production to him, and the name, residence, and description of the person in whom the said order shall purport to vest the said land, and such person shall thereupon be deemed to be the registered proprietor of such land, and unless and until such entry shall be made, the said order shall have no effect or operation in transferring or otherwise vesting the said land.

Action may be brought by person claiming beneficiary interest in name of trustee.

Trustee to be indemnified.

Purchaser from registered proprietor not to be affected by notice.

Registered proprietor suing for specific performance.

Mortgagee may apply to Registrar General for an order for foreclosure.

110. Whenever a person entitled to or interested in land as a trustee, would be entitled under the last preceding clause to bring or defend any action of ejectment in his own name for recovering the possession of land under the provisions of this Act, such person shall be bound to allow his name to be used as a plaintiff or defendant in such action of ejectment, by any beneficiary or person claiming an estate or interest in the said land: Provided nevertheless, that the person entitled or interested as such trustee shall in every such case be entitled to be indemnified, in like manner as a trustee would before the passing of this Act have been entitled to be indemnified in a similar case of his name being used in any such action or proceeding by his cestuique trust.

111. Except in the case of fraud no person contracting or dealing with, or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest, shall be required, or in any manner concerned to inquire or ascertain, the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money, or of any part thereof, or shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

112. In any suit for specific performance brought by a registered proprietor of any land under the provisions of this Act against a person who may have contracted to purchase such land, not having notice of any fraud or other circumstances which according to the provisions of this Act would affect the right of the vendor, the certificate of title of such registered proprietor shall be held in every Court of Law or Equity to be conclusive evidence that such registered proprietor has a good and valid title to the land and for the estate or interest therein mentioned or described, and shall entitle such registered proprietor to a decree for the specific performance of such contract.

113. When default has been made in the payment of the interest or principal sum secured by memorandum of Mortgage, for six months, a registered mortgagee or his solicitor attorney or agent may make application in writing to the Registrar General for an order for foreclosure, and such application shall state that such default has been made as aforesaid, and that the land, estate, or interest mortgaged has been offered for sale at public auction by a licensed auctioneer after notice given to the mortgagor as in this Act provided, and that the amount of the highest bid at such sale was not sufficient to satisfy the money secured by such mortgage, together with the expenses occasioned by such sale, and that notice in writing of the intention of such mortgagee to make such application has been given to the mortgagor by leaving the same at his usual or last-known place of abode, if such place be within three miles of the residence of such mortgagee, or by forwarding the same by registered letter through the Post Office, if such place be beyond that distance; and such application shall be accompanied by a certificate of the auctioneer by whom such land was put up for sale, and such other proof of the matters stated by the applicant as the Registrar General may require, and the statements made in such application shall be verified by the oath or statutory declaration of the applicant or other person applying on his behalf.

the Court to make such order in the premises as in its judgment the circumstances of the case might require. *Held*, that the legal estate was vested in the five trustees, and that they had a power of selling and conveying a title in fee simple to purchasers. Also *held* (Sir J. Martin, C.J., dissenting), that the trustees had complied with the provisions of the Lands Titles Act, and that the application should be sent back to the Registrar General to cause the investigation of the title to be proceeded with. The order drawn up (and settled by the Court) was as follows:—"1. That all the applicants have vested in them the legal estate of the lands devised by the will of *James Underwood* in the said application mentioned, with full power to sell and convey the same absolutely to the purchasers, their heirs and assigns, freed and discharged from all the trusts created under the said will, and from all derivative interests thereunder. 2. That the applicants have sufficiently complied with the terms of the 14th section of the Real Property Act to require the Land Titles Commissioners to direct the publication of the notices required by the 17th section of the Act, and to proceed in due course with all the inquiries necessary to enable them to determine upon the said application to bring the said lands within the said Act; and it is ordered that the Registrar General do cause the said application to be further proceeded with accordingly." *Ex parte Pennington and others*, 13, S.C.R., 305.

114. The Registrar General shall refer such application to the Commissioners, who may direct the Registrar General to cause notice to be published once in the *Gazette* and once in each of three successive weeks in at least one daily newspaper published in Sydney offering such land for sale, and shall further limit and appoint a time not less than one month from the date of the publication in the *Gazette*, upon or after which the Registrar General may issue to such applicant an order for foreclosure unless in the interval a sufficient amount has been realized by the sale of such land to satisfy the principal and interest moneys due and all expenses occasioned by such sale and proceedings; and every such order for foreclosure under the hand of the Registrar General and entered in the register book shall have the effect of vesting in the mortgagee all the estate and interest of the mortgagor in the land mentioned in such order free from all right and equity of redemption on the part of the mortgagor or of any person claiming through or under him.

Application how made effective.

115. No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases that is to say—

Registered proprietor protected against ejectments except in certain cases.

- (1.) The case of a mortgagee as against a mortgagor in default.
- (2.) The case of an encumbrance as against an encumbrancer in default.
- (3.) The case of a lessor as against a lessee in default.
- (4.) The case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee *bond fide* for value from or through a person so registered through fraud.
- (5.) The case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries as against the registered proprietor of such other land not being a transferee thereof *bond fide* for value.
- (6.) The case of a registered proprietor claiming under the instrument of title prior in date of registration under the provisions of this Act in any case in which two or more grants, or two or more certificates of title, or a grant and a certificate of title, may be registered under provisions of this Act in respect to the same land.

And in any case other than as aforesaid, the production of the registered grant, certificate of title, or lease shall be held in every Court of Law or Equity to be an absolute bar and estoppel to any such action against the person named in such instrument as seized of or as registered proprietor or lessee of the land therein described, any rule of law or equity to the contrary notwithstanding.

116. Whenever an action shall be brought against a registered proprietor, or person holding a grant or certificate of title in either of the last two cases, except in the next preceding section if the defendant or any person through whom he claims shall have made improvements on the land since obtaining a certificate of title thereto, then whether he admit or deny the plaintiff's title he may plead the fact of such improvements being made and may set a value thereon, and also on the land as distinct therefrom, and give evidence thereof, at the trial, and if a verdict be found for the plaintiff or his title be admitted, the jury shall assess the value of the alleged improvements, and shall also separately assess the value which the land would have possessed if the said improvements had not been made. And no writ of possession shall issue in such case unless the plaintiff shall first pay into Court, for the use of the defendant, the value of the improvements so assessed, deducting only the costs (if any) to which he shall be entitled in the action. And if the plaintiff shall fail to make such payment within three months after verdict, the judgment to which he is entitled shall thereafter be limited to the sum separately assessed as the value of the land, together with costs of suit. And the defendant shall upon satisfaction thereof be entitled to retain the land and improvements, and in either case the Registrar General shall be entitled, under the power hereinafter conferred, of cancelling erroneous certificates, to require to be delivered up any certificate of title which shall be held by the party whose right to the land shall have determined: Provided that in every case in which the defendant shall be entitled to indemnity from the assurance fund the Registrar General shall be made a co-defendant as trustee of such fund, and may defend the action either severally or jointly, or may leave the defence wholly to his co-defendant as he shall see fit. And in no case shall the assurance fund be liable to the principal defendant for any greater damages than he shall actually sustain as the result of such action, after using all reasonable diligence in the defence thereof.

In case of ejectment of defendant who has made improvements their value may be assessed.

And plaintiff shall either pay for improvements or be restricted to damages for the loss of the unimproved land.

Registrar General to be made co-defendant.

Assurance fund to be liable only for actual loss sustained by defendant. Compensation of party deprived of land.

117. Any person deprived of land, or of any estate or interest in land, in consequence of fraud, or through the bringing of such land under the provisions of this Act, or by the registration of any other person as proprietor of such land, estate, or interest, or in consequence of any error, omission, or misdescription in any certificate of title, or in any entry or memorial in the register book, may in any case in which such land has been included in two or more grants from the Crown, bring and prosecute an action at law for the recovery of damages against such person as the Governor with the advice

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aforesaid may appoint as nominal defendant, and in any other case against the person upon whose application such land was brought under the provisions of this Act, or such erroneous registration was made, or who acquired title to the estate or interest in question through such fraud, error, or misdescription: Provided always that in every case in which the fraud, error, or misdescription shall occur upon a transfer made for value, the person making the transfer and receiving the value shall be regarded as the person upon whose application the certificate of title was issued to the transferee: And provided further that, except in the case of fraud or of error occasioned by any omission, misrepresentation, or misdescription in the application of such person to bring such land under the provisions of this Act, or to be registered as proprietor of such land, estate, or interest, or in any instrument executed by him, such person shall upon a transfer of such land *bond fide* for value cease to be liable for the payment of any damages which, but for such transfer, might have been recovered from him under the provisions hereinbefore contained; and in such last-mentioned case, and also in case the person against whom such action for damages is directed to be brought as aforesaid shall be dead, or shall have been adjudged insolvent, or cannot be found within the jurisdiction, then and in any such case such damages, with costs of action, may be recovered out of the assurance fund by action against the Registrar General as nominal defendant.

Purchasers and mortgagees protected.

118. Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages as aforesaid, or to action of ejectment, or to deprivation of the estate or interest in respect to which he is registered as proprietor, any purchaser or mortgagee *bond fide* for valuable consideration, of land under the provisions of this Act, on the plea that his vendor or mortgagor may have been registered as proprietor, or procured the registration of the transfer to such purchaser or mortgagee through fraud or error, or may have derived from or through a person registered as proprietor through fraud or error, and this whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.

When actions may lie against the Registrar General as nominal defendant.

119. Any person sustaining loss or damages through any omission, mistake, or misfeasance of the Registrar General, or any of his officers or clerks, in the execution of their respective duties under the provisions of this Act, or by the registration of any other person as proprietor of such land, or by any error, omission, or misdescription in any certificate of title, or any entry or memorial in the register-book, and who by the provisions of this Act is barred from bringing action of ejectment or other action for the recovery of such land, estate, or interest, may, in any case in which the remedy by action for recovery of damages as hereinbefore provided is inapplicable, bring an action against the Registrar General as nominal defendant for recovery of damages.

Notice of action.

120. In any case in which action for recovery of damages is permitted to be brought against the Registrar General as nominal defendant, as hereinbefore provided, notice in writing of such action, and of the cause thereof, shall be served upon such nominal defendant one month at least before the commencement of such action; and if in any such action judgment be given in favour of the nominal defendant, or the plaintiff discontinue or become nonsuit, the plaintiff shall be liable to pay the full costs of defending such action, and the same when taxed shall be levied in the name of the nominal defendant by the like process of execution as in other actions on the case.

Deficiency of assurance fund supplied temporarily out of public fund.

121. If in any such action the plaintiff recover final judgment against such nominal defendant, then the Court or Judge before whom such action may be tried shall certify the fact of such judgment and the amount of damages and costs recovered; and the amount of such damages and costs shall be paid to the person recovering the same, and shall be charged to the account of the assurance fund; and in case the balance to the credit of the assurance fund shall be inadequate to defray the amount specified, such sum as may be necessary for that purpose shall be paid out of the Consolidated Revenue Fund, and the amount so advanced shall be repaid from the assurance fund as the same may thereafter accrue.

Limitation of actions.

122. No action for recovery of damages sustained through deprivation of land, or of any estate or interest in land as hereinbefore described, shall lie or be sustained against the Registrar General or against the assurance fund, or against the person upon whose application such land was brought under the provisions of this Act, or against the person who applied to be registered as proprietor in respect to such land, or against the person certifying any instrument as aforesaid, unless such action shall be commenced within the period of six years from the date of such deprivation: Provided nevertheless that any person being under the disability of coverture, infancy, unsoundness of mind, or absence from the Colony, may bring such action within six years from the date on which such disability shall have ceased; and the plaintiff in any such action at whatever time it may be brought, or the plaintiff in action for the recovery of land, shall be nonsuited in any case in which the deprivation complained of may have been occasioned through the bringing of land under the provisions of this Act if it shall be made to appear to the satisfaction of the Court before which such action shall be tried that such plaintiff or the persons through or under whom he claims title had notice by personal

service, or otherwise, or was aware that application had been made to bring such land under the provisions of this Act, and had wilfully or collusively omitted to lodge caveat forbidding the same, or had allowed such caveat to lapse.

123. Whenever any amount has been paid out of the assurance fund on account of any person who may be dead, such amount may be recovered from the estate of such person by action against his personal representatives in the name of the Registrar General; and whenever such amount has been paid on account of a person who shall have been adjudged insolvent, the amount so paid shall be considered to be a debt due from the estate of such insolvent, and a certificate signed by the Colonial Treasurer, certifying the fact of such payment out of the assurance fund, and delivered to the Official Assignee, shall be sufficient proof of such debt; and whenever any amount has been paid out of the assurance fund on account of any person who may have absconded, or who cannot be found within the jurisdiction of the Supreme Court, and may have left any real or personal estate within the said Colony, it shall be lawful for the said Court or a Judge thereof upon the application of the Registrar General, and upon the production of a certificate, signed by the said Treasurer, certifying that the amount has been paid in satisfaction of a judgment against the Registrar General as nominal defendant, to allow the Registrar General to sign judgment against such person forthwith for the amount so paid out of the assurance fund, together with the costs of the application, and such judgment shall be final and signed in like manner as a final judgment by confession or default in an adverse suit, and execution may issue immediately; and if such person shall not have left real or personal estate within the said Colony sufficient to satisfy the amount for which execution may have been issued as aforesaid, it shall be lawful for the Registrar General to recover such amount, or the unrecovered balance thereof, by action against such person at any time thereafter when he may be found within the jurisdiction of the Supreme Court.

124. The assurance fund shall not under any circumstances be liable for compensation for any loss, damage, or deprivation occasioned by the breach by a registered proprietor of any trust whether express implied or constructive, nor in any case in which the same land may have been included in two or more grants from the Crown, nor shall the assurance fund be liable in any case in which such loss or deprivation has been occasioned by any land being included in the same certificate of title with other land through misdescription of boundaries or parcels of any land, unless in the case last aforesaid it shall be proved that the person liable for compensation and damages is dead, or has absconded, or has been adjudged insolvent, or the Sheriff shall certify that such person is unable to pay the full amount awarded in any action for recovery of such compensation and damages.

125. The Registrar General shall not, individually, nor shall any person acting under his authority, be liable to any action, suit, or proceeding for or in respect of any act or matter *bond fide* done, or omitted to be done, under this Act.

126. In case it shall appear to the satisfaction of the Registrar General, that any certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any grant, certificate of title, or other instrument, or that any such grant, certificate, instrument, entry, or endorsement, has been fraudulently or wrongfully obtained, or that any such grant, certificate, or instrument, is fraudulently or wrongfully retained, he may summon the person to whom such grant, certificate, or instrument has been so issued, or by whom it has been so obtained, or is retained, to deliver up the same for the purpose of being cancelled or corrected as the case may require; and in case such person shall refuse or neglect to comply with such summons, or cannot be found, the Registrar General may apply to a Judge of the Supreme Court to issue a summons for such person to appear before such Court or Judge and show cause why such grant, certificate, or other instrument should not be delivered up to be cancelled or corrected as aforesaid; and if such person when served with such summons shall neglect or refuse to attend before such Judge or Court at the time therein appointed, it shall be lawful for such Judge to issue a warrant authorizing and directing the person so summoned to be apprehended and brought before a Judge of the Supreme Court for examination.

127. Upon the appearance before the Court or Judge of any person summoned or brought up by virtue of a warrant as aforesaid, it shall be lawful for the Court or Judge to examine such person upon oath, and in case the same shall seem proper, to order such person to deliver up such grant, certificate of title, or other instrument as aforesaid, and upon refusal or neglect by such person to deliver up the same, pursuant to such order, to commit such person to the common gaol of the Colony; and in such case, or in case such person shall have absconded so that summons cannot be served upon him as hereinbefore directed, the Registrar General shall, if the circumstances of the case require it, issue to the proprietor of the said land such certificate of title or other instrument as is herein provided to be issued in the case of any grant or certificate of title being lost, mislaid, or destroyed, and shall enter in the Register Book notice of the issuing of the said certificate of title or other instrument, and the circumstances under which the same was issued, and such other particulars as he may deem necessary.

Moneys paid out of assurance fund may be recovered.

Assurance fund only liable in certain cases.

Registrar General not to be liable for acts done *bond fide*.

Holder of certificate or other instrument of title issued in error, or wrongfully retained, to show cause to Court against cancellation or correction.

Court may order the delivery of the instrument to the Registrar General.

In case of neglect or refusal Registrar General may issue a fresh certificate or other instrument.

Court may direct cancellation of certificate or entry.

128. Upon the recovery of any land, estate, or interest by any proceeding at law or in equity from the person registered as proprietor thereof, it shall be lawful for the Court or Judge, in any case in which such proceeding is not hereinbefore expressly barred, to direct the Registrar General to cancel any certificate of title or other instrument, or any entry or memorial in the Register Book relating to such land, and to substitute such certificate of title or entry as the circumstances of the case may require, and the Registrar General shall give effect to such order.

Oath of sworn valuator.

129. Every sworn valuator shall within fourteen days of the date of his appointment, and before performing any duties under this Act, take the following oath before the Registrar General, who is hereby authorized to administer the same—

I, _____, do solemnly swear that I will faithfully and honestly, and to the best of my skill and ability, make any valuation required of me under the provisions of the "Real Property Act."

Certain fraudulent acts to be deemed misdemeanors.

130. If any person fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of any certificate of title or other instrument or of any entry in the Register Book or of any erasure or alteration in any entry in the Register Book or in any instrument or form issued by the Registrar General, or fraudulently uses, assists in fraudulently using, or is privy to the fraudulent using of any form purporting to be issued or sanctioned by the Registrar General, or knowingly misleads or deceives any person hereinbefore authorized to demand explanation or information in respect to any land or the title to any land which is the subject of any application to bring the same under the provisions of this Act, or in respect to which any dealing or transmission is proposed to be registered or recorded, such person shall be guilty of a misdemeanor, and shall incur a penalty not exceeding five hundred pounds, or may at the discretion of the Court before whom the case may be tried be imprisoned for any period not exceeding three years; and any certificate of title, entry, erasure, or alteration so procured or made by fraud, shall be void as between all parties or privies to such fraud.

Conviction not to affect civil remedy.

131. No proceeding or conviction of any act hereby declared to be a misdemeanor or a felony shall affect any remedy which any person aggrieved or injured by such act may be entitled to at law or in equity against the person who has committed such act or against his estate.

Forgery to be a felony.

132. If any person is guilty of the following offences or any of them (that is to say)—

- (1.) Forges or procures to be forged or assists in forging the Seal of the Registrar General, or the name, signature, or handwriting of any officer of the Registry Office, in cases where such officer is by this Act expressly or impliedly authorized to affix his signature.
- (2.) Stamps or procures to be stamped or assists in stamping any document with any forged seal purporting to be of the Registry Office.
- (3.) Forges or procures to be forged or assists in forging the name, signature, or handwriting of any person whomsoever to any instrument which is by this Act or in pursuance of any power contained in this Act expressly or impliedly authorized to be signed by such person.
- (4.) Uses with an intention to defraud any person whomsoever any document upon which any impression or part of the impression of any seal of the Registry Office has been forged, knowing the same to have been forged, or any document the signature to which has been forged, knowing the same to have been forged:

Such person shall be guilty of felony, and if any person is guilty of making a false oath or declaration concerning any matter or procedure made or done in pursuance of this Act, such person shall be deemed guilty of perjury.

Punishment of felony.

133. Any person convicted of felony or perjury under this Act shall be liable to imprisonment for any term not exceeding four years, and to be kept to hard labour or solitary confinement for any part of the period aforesaid.

Rules of Supreme Court to apply and same right of appeal as in ordinary actions. Supreme Court may make rules, &c.

134. In the conduct of actions under this Act the same rules of procedure and practice shall apply, and there shall be the same rights of appeal, as are in force or exist for the time being in respect of ordinary actions in the Court in which such action may be tried: Provided that the Judges of the Supreme Court shall have power from time to time to make rules and orders for regulating proceedings in the Supreme Court under this Act, and from time to time to rescind, alter, or add to such rules and orders in like manner as at present. (*)

Jurisdiction.

135. Unless in any case herein otherwise expressly provided, all offences against the provisions of this Act may be prosecuted, and all penalties or sums of money imposed or declared to be due or owing by, or under the provisions of the same, may be sued for and recovered in the name of the Attorney or Solicitor General before any Court in the Colony having jurisdiction for punishment of offences of the like nature, or for the recovery of penalties or sums of money of the like amount.

Commencement of Act.

136. This Act shall commence and take effect from and after the first day of January, one thousand eight hundred and sixty-three.

(*) No Rules or Orders under this section have been made by the Judges, so far as the editor is aware.

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SCHEDULES REFERRED TO. (*)

A.

Application to bring Land under the provisions of the Real Property Act.

I, A. B., of do declare (that I am) or (on behalf of) of that he is) seized of an estate of (here state whether of inheritance or of a life estate or leasehold for a life or lives or term of years and whether held in trust) in all that piece of land situated in (here state the situation), containing (here state the area) be the same a little more or less (exclusive of roads intersecting the same, if any) with (here state rights of way and other privileges or easements appertaining, and set forth a sufficient description to identify the land), which piece of land is of the value of £ and no more, and is (the town allotment or country section, or is part of the town allotment country section or reserve) originally granted to by land grant, under the hand and seal of , formerly Governor of the Colony of .

Dated the day of , numbered in the plan of the (district township or county) of , as delineated on the public maps of the Colony deposited in the Survey Office, Sydney. And I do further declare that I am not aware of any mortgage, encumbrance, or claim affecting the said land, or that any person hath any claim, estate, or interest in the said land at law or in equity, in possession or in expectancy, other than is set forth and stated as follows, that is to say (here state particulars of mortgages, encumbrances, dower, or other interest to which the land may be subject). And I further declare that there is no person in possession or occupation of the said lands adversely to my estate or interest therein, and that the said land is now (here state name and description of occupier or that the land is unoccupied) and that (here state the names and addresses of owners and occupiers of lands contiguous thereto), and that there are no deeds or instruments of title affecting such land in my possession or under my control other than those enumerated in the Schedule hereto or at foot hereof. And I make this solemn declaration conscientiously believing the same to be true.

Dated at this day of 18
Made and subscribed by the above-named this day of
in the presence of me, Registrar General or Justice of the Peace.
I A. B., the above declarant, do hereby apply to have the piece of land described in the above declaration brought under the provisions of the Real Property Act.
Dated at this day of 18
Witness to signature—C. D.

B.

Caveat forbidding Lands to be brought under the Real Property Act.

Take notice, that I, , of , claiming estate or interest (here state the nature of the estate or interest claimed and the ground on which such claim is founded) in lands described as (here state particulars of description from declaration of applicant) in notice dated the day of , advertising the same as land in respect to which claim has been made to have the same brought under the provisions of the Real Property Act, do hereby forbid the bringing of the said land under the provisions of the said Act.

And I appoint as the place at which notices relating hereto may be served.
Dated this day of 18

A. B.

Signed in my presence this day of
To the Registrar General of the Colony of New South Wales.

C.

NEW SOUTH WALES.

[Royal Arms.]

Certificate of Title.

A. B., of (here insert description, and if certificate be issued pursuant to any transfer, reference to memorandum of transfer) is now seized of an estate (here state whether in fee simple or leasehold for a life, or lives, or for a term of years) subject nevertheless to

(*) The forms given in these Schedules are now superseded, in most cases, by new Forms, for which see *post*, p. 118 *et seq.* Note that the directions which in the authorized Forms appear as side-notes or rubrics are, of necessity, printed in the present collection in the shape of foot-notes.

REAL PROPERTY.

such encumbrances liens and interests as are notified by memorial underwritten or indorsed hereon, in that piece of land situated in the (county or township) of (here insert sufficient description to identify the land, referring to map or diagram) which said piece of land is (or is part of) the county, section, or town allotment marked delineated in the public map of the said county or township) deposited in the office of the Surveyor General originally granted the day of under hand and seal of Governor of the said Colony to C. D.

In witness whereof I have hereunto signed my name and affixed my seal,
 this day of
 Signed in presence of the day of } Registrar General. (L.S.)

D.

Memorandum of Transfer.

I, A. B., being registered as the proprietor of an estate (here state nature of the estate or interest) subject however to such encumbrances, liens, and interests as are notified by memorandum underwritten or indorsed hereon, in all that piece of land situated in the (county or township) of containing (here state area) be the same a little more or less (exclusive of roads intersecting the same if any [here state rights of way, privileges or easements, if any, intended to be conveyed], and if the land to be dealt with contains all that is included in an existing grant or certificate, refer thereto for description of parcels and diagrams, otherwise set forth the boundaries in chains, links, or feet, and refer to plan delineated on the margin, or annexed to the instrument, or deposited in the Registry Office) in consideration of the sum of £ paid to me by E. F., the receipt of which sum I hereby acknowledge, do hereby transfer to the said E. F. (all my estate or interest, or a lesser estate or interest, describing such lesser estate) in the said piece of land.

In witness whereof I have hereunto subscribed my name, this day of
 Signed on the day above named by the said }
 A. B. and E. F. in the presence of G. H. }

A. B. Transferor.
 E. F. Transferee.

E.

Transfer to be indorsed on original Instrument.

I, the within-mentioned, C. D., in consideration of £ this day paid to me by X. Y., of , the receipt of which sum I do hereby acknowledge, hereby transfer to him the estate or interest in respect to which I am registered proprietor as set forth and described in the within instrument, together with all my rights powers estate and interest therein.

In witness whereof I have hereunto subscribed my name, this day of
 Signed by the above-mentioned C. D. as transferror }
 and X. Y. as transferee in the presence of }
 E. F. the day of } C. D. Transferor.
 Accepted X. Y. Transferee.

F.

Memorandum of Lease.

I, A. B. being registered as proprietor of an estate (here state nature of the estate or interest) subject however to such encumbrances liens and interests as are notified by memorandum underwritten or indorsed hereon, in that piece of land situated in the (county or township) of containing (here state area) be the same a little more or less (exclusive of roads intersecting the same if any [here state rights of way, privileges, or easements if any intended to be conveyed] if the land to be dealt with contains all that is included in an existing grant or certificate of title or lease refer thereto for description and diagram, otherwise set forth the boundaries in chains, links, or feet, and refer to a plan thereof on margin of or annexed to the lease, or deposited in the Registry Office), do hereby lease to E. F., of (here insert description), all the said lands to be held by him the said E. F., as tenant for the space of years, at the yearly rental of £ payable (here insert terms of payment as rent), subject to the following covenants conditions and restrictions (here set forth all special covenants if any).

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I, E. E., of *(here insert description)* do hereby accept this lease of the above described lands to be held by me as tenant, and subject to the conditions restrictions and covenants above set forth.

Dated this day of

Signed by the above-named A. B. as lessor, and by the above-named E. F. as lessee, this day of , in presence of X. Y.

(Signed) A. B., Lessor.
E. F., Lessee.

G.

Memorandum of Mortgage.

I, A. B., being registered as proprietor of an estate *(here state nature of the estate or interest)*, subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon, in that piece of land situated in the *(county or township)* of , containing *(here state area)*, be the same a little more or less *(exclusive of roads intersecting the same if any [here state rights of way, privileges, or easements, if any appertaining])*; and if the land to be dealt with contains all that is included in an existing grant or certificate of title or lease refer thereto for description of parcels and diagram, otherwise set forth the boundaries in chains, links, or feet, and refer to plan thereof on margin of or annexed to the mortgage, or deposited in the Registry Office.)

In consideration of the sum of £ this day lent to me by E. F., of *(here insert description)*, the receipt of which sum I hereby acknowledge, do hereby covenant with the said E. F. that I will pay to him the said E. F. the above sum of £ on the day of . Secondly, that I will pay interest on the said sum at the rate of £ by the £100 in the year by equal payments on the day of , and on the day of in every year. Thirdly *(here set forth special covenants if any)*. And for the better securing to the said E. F. the repayment in manner aforesaid of the said principal sum and interest, I hereby mortgage to the said E. F. all my estate and interest in the said land above described.

In witness whereof I have hereto signed my name, this day of ,
A. B., Mortgagor.

Signed by the above-named A. B. as mortgagor, this day of , in presence of G. H.

H.

Memorandum of Encumbrance for securing a Sum of Money.

I, A. B., being registered as proprietor of an estate *(here state nature of the estate or interest)*, subject however to such encumbrances liens and interests as are notified by memoranda underwritten or indorsed hereon, in that piece of land situated in *(the county or township)* of , containing *(here state area)*, be the same a little more or less *(exclusive of roads intersecting the same if any [here also state rights of way, privileges, or easements, if any appertaining])*, and if the land to be dealt with contains all that is included in an existing grant or certificate of title refer thereto for description of parcels and diagram, otherwise set forth the boundaries in chains, links, or feet, and refer to plan thereof on margin of or annexed to the bill of encumbrance, or deposited in the Registry Office).

And desiring to render the said land available for the purpose of securing to and for the benefit of C. D. the *(sum of money, annuity, or rent charge)* hereinafter mentioned, do hereby encumber the said land for the benefit of the said C. D. with the *(sum, annuity, or rent charge)* of £ , to be raised and paid at the times and in the manner following, that is to say *(here state the times appointed for the payment of the sum, annuity, or rent charge intended to be secured, the interest if any, and the events on which such sum, annuity, or rent charge shall become and cease to be payable, also any special covenants or powers, and any modification of the powers or remedies given to an encumbrance by the Real Property Act)*. And, subject as aforesaid, the said C. D. shall be entitled to all powers and remedies given to an encumbrancee by the Real Property Act.

In witness whereof I have hereunto signed my name, this day of ,
in the presence of E. F.

REAL PROPERTY.

I.

Power of Attorney.

I, A B, being registered as proprietor of an estate (*here state nature of the estate or interest*) subject however to such encumbrances liens and interests as are notified by memorandum underwritten or indorsed hereon, in (*here refer to schedule for description and contents of the several parcels of land intended to be affected, which schedule must contain reference to the existing certificate of title or land grant, or lease of each parcel*) do hereby appoint C. D. attorney on my behalf to (*here state the nature and extent of the powers intended to be conferred as whether to sell, lease, mortgage, &c.*) the lands in the said schedule described, and to execute all such instruments, and do all such acts matters and things as may be necessary for carrying out the powers hereby given, and for the recovery of all rents and sums of money that may become or are now due or owing to me in respect of the said lands, and for the enforcement of all contracts, covenants or conditions binding upon any lessee or occupier of the said lands, or upon any other person in respect of the same, and for the taking and maintaining possession of the said lands, and for protecting the same from waste damage or trespass.

In witness whereof I have hereunto subscribed my name, this day of

Signed by the above-named A.B., this day of , in the presence of X.Y.
Schedule referred to.

K.

NEW SOUTH WALES.

*Registration Abstract.**[Royal Arms.]**[Copy of grant or certificate.]*

Pursuant to Act of the Legislature of the said Colony, intituled "The Real Property Act," sections 70 and 71, this registration abstract is issued for the purpose of enabling the registered proprietor to deal with the above described land at places without the limits of the said Colony, and shall continue in force from the date hereof until the day of or until the same be surrendered to me for cancellation.

In witness whereof I have hereunto signed my name and affixed my seal, this day of

Registrar General.

Signed and sealed the day of , in the presence of X.Y.

L.

Revocation Order.

I, A. B., of being seised of an estate (*here state the nature of the estate*) all that piece of land (*here describe land referring to the existing grant, certificate, or other instrument of title*) hereby revoke the power of attorney given by me to dated the day of

In witness whereof I have hereunto subscribed my name this day of
in the presence of A. B. of

M.

Caveat forbidding registration of dealing with estate or interest.

To the Registrar General.

Take notice that I claiming estate or interest (*here state the nature of the estate or interest claimed, and the grounds on which such claim is founded*) in (*here describe land*) forbid the registration of any memorandum of transfer or instrument affecting the said land until (this caveat be by me or by the order of the Supreme Court or some Judge thereof withdrawn, or until after the lapse of twenty-one days from the date of the service of notice of such intended registration at the following address).

Dated this day of 18 .

Witness

N.

Certificate of Registrar General, Justice of the Peace, &c., taking declaration of attesting witness.

Appeared before me at , the day of C. D. of a person known to me, and of good repute, attesting witness to this instrument, and acknowledged his signature to the same, and did further declare that A. B. the party executing the same was personally known to him the said C. D., and that the signature of this said instrument is in the handwriting of the said A. B.

(Signed)

Registrar General or J.P.

O.

Certificate of Registrar General or Justice of the Peace before whom instrument may have been executed by the parties thereto.

Appeared before me at _____, the _____ day of _____, A. B., of _____ the party executing the within instrument, and did freely and voluntarily sign the same.

(Signed)

Registrar General or J.P.

P.

Fees payable for the performance of the several acts matters and things herein specified.

For hearing application to bring land under the provisions of this Act, or to be registered in respect to an estate of freehold of a deceased proprietor, to be paid to the Land Titles Commissioners over and above the cost of all advertisements herein prescribed to be in such case published:—

	£	s.	d.
When the applicant is the original grantee, and the land has never been sold, mortgaged, encumbered, or made the subject of settlement	0	5	0
When the title is of any other description, and the value exceeds £500	2	10	0
Ditto ditto ditto exceeds £400 and does not exceed £500	2	0	0
Ditto ditto ditto exceeds £300 and does not exceed £400	1	10	0
Ditto ditto ditto exceeds £200 and does not exceed £300	1	0	0
Ditto ditto ditto when the value does not exceed £200... ..	0	10	0
Contribution to assurance fund upon first bringing land under this Act, and upon the registration of an estate of freehold in possession derived by settlement will or intestacy—			
In the pound sterling	0	0	0½
Other fees—			
For every certificate of title	1	0	0
Registering memorandum of transfer, lease, mortgage, encumbrance, or the transfer or discharge of a mortgage, or the transfer or surrender of a lease... ..	0	10	0
Registering proprietor of any estate or interest derived by settlement or transmission	1	0	0
For every power of attorney	0	10	0
For every registration abstract	1	0	0
For cancelling registration abstract	0	5	0
For every revocation order	0	10	0
Noting caveat	0	10	0
Cancelling or withdrawing of caveat, and service of notice to caveator or caveatee	0	5	0
Issuing order for foreclosure	1	0	0
For every search	0	2	0
For every general search	0	5	0
For every map or plan deposited	0	5	0
For every instrument declaratory of trusts, and for every will or other instrument deposited	0	10	0
For registering recovery by proceeding in law or equity or re-entry by lessee	0	10	0
For registering vesting of lease in mortgagee consequent on refusal of assignees to accept the same	0	10	0
For entering notice of marriage or death	0	10	0
For entering notice of writ or order of Supreme Court	0	10	0
Taking acknowledgment of married woman	0	5	0
Taking declaration in case of lost grant or other instrument, or where production of duplicate is dispensed with	0	10	0
For the exhibition or return of any deposited instrument, or for exhibiting or returning deeds surrendered by applicant proprietor	0	5	0
For certified copy, first five folios, per folio of seventy-two words	0	5	0
For every folio or part folio after first five	0	0	8
For every instrument drawn on parchment	0	2	6
Taking affidavit or statutory declaration	0	5	0
When any instrument purports to deal with land included in more than one grant or certificate, for each registration memorial after the first... ..	0	2	0

REAL PROPERTY (FORMS).

Forms of Instruments under Real Property Act as last amended.

New South Wales.

(A.)

APPLICATION TO BRING LANDS UNDER THE PROVISIONS OF THE REAL PROPERTY ACT.

(26 Victoria, No. 9.)

CAUTION.—Applicants are reminded, that by section 132, the penalties of perjury are attached to a false declaration concerning any matter or procedure under the Act, and that the utmost care is therefore necessary in framing (or reading over, if the form be filled up by an attorney) every particular statement herein.

It is further provided by section 117, that any applicant procuring a Certificate through any fraud, error, omission, misrepresentation, or misdescription, will, notwithstanding the issue of such certificate, remain liable for damages to any person thereby prejudiced. And any person who fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of any Certificate of Title, is declared guilty of a misdemeanor, and liable to a penalty not exceeding £500 or imprisonment not exceeding three years; and any certificate thereby procured is rendered void as between all parties or privies to the fraud.

Fee Simple.

(Another form can be obtained for leaseholds.)

I, ^a do solemnly and sincerely declare, that^b seized for an
estate in fee simple of^c which land (including all improvements)
is of the value of^d and no more, and is^e off^f
originally granted to^g by Crown Grant, under the Hand of^h
Governor of the Colony, dated the day of 18 .

And I further declare, that I verily believe there does not exist any lease or agreement for lease of the said land for any term exceeding a tenancy for one year, or from year to year [*except as follows*]ⁱ Also, that there does not exist any mortgage, lien, writ of execution, charge or encumbrance, will or settlement, or any deed or writing, contract or dealing (other than such lease or tenancy as aforesaid) giving any right, claim, or interest in or to the said land or any part thereof, to any other person than myself [*except as follows*—]^j

And I further declare, that there is no person in possession or occupation of the said lands adversely to my estate or interest therein, and that the said land is now^k
and that the owners and occupiers of adjacent lands are as follows^l:—On the
north owner, and occupier; on the^m

And I further declare, thatⁿ

And I further declare, that the annexed Schedule, to which my signature is affixed, and which is to be taken as part of this declaration, contains a full and correct list of all settlements, deeds, documents, or instruments, maps, plans, and papers relating to the land comprised in this application, so far as I have any means of ascertaining the same, distinguishing such as being in my possession or under my control, are herewith lodged, and indicating where or with whom, so far as known to me, any others thereof are deposited: Also, that there does not exist any fact or circumstance whatever material to the title, which is not hereby fully and fairly disclosed to the utmost extent of my knowledge, information, and belief; and that there is not, to my knowledge and belief, any action or suit pending affecting the said land, nor any person who has or claims any estate, right, title, or interest therein, or in any part thereof, otherwise than by virtue and to the extent of some lease or tenancy hereby fully disclosed [*except as follows*—]^o

^a Here state Christian and Surname in full with residence and occupation.

^b "I am," or "C.D. of" is" (as the case may be.)

^c Here give description of the property in full. If the land consists of a Crown Grant, a diagram from the Survey Office must be procured—and on payment of a special fee of 2s. 6d. accompanying the application, this will be obtained through the Land Titles Department. If the land comprise a portion only of a grant, an accurate plan must accompany the application. It is always desirable, and in many cases absolutely necessary, that this plan be prepared and certified by one of the surveyors licensed under the Act. If there be any rights of way, or other rights or easements affecting the premises, the particulars should be stated. If the space for description be insufficient, it may be completed by annexure, which must, however, be identified as part of the declaration, by memorandum signed by the declarant and attesting officer.

^d If this valuation be inadequate or doubtful, the applicant will be subjected to the expense of an official valuation, under section 27.

^e State whether "the whole" or "part."

^f Insert allotment with reference to number and section on plan, if any, or if not, number of acres granted.

^g Name of grantee.

^h Name of Governor.

ⁱ If there be any lease, here state particulars; if none, strike out the words within brackets.

^j If any exception, here state particulars; if none, strike out the words of reference within brackets.

^k Insert "unoccupied," or "in the occupation of," adding the names and addresses of tenants in full. State also nature of tenancy, if not under some lease before mentioned.

^l Here insert names and residences of adjacent owners and occupiers on each side.

^m Insert the like particulars as to the other sides of the property.

ⁿ Here insert "am unmarried," or "was married to my present wife on the day of 18 "

^o If any exception, state particulars; if none, strike out the words within brackets.

REAL PROPERTY (FORMS).

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And I make this solemn declaration, conscientiously believing the same to be true.

Dated at this day of 187 .

Made and subscribed by the abovenamed } Signature of Applicant.

this day of 187
in the presence of

To the Registrar General.

I, , the above declarant, do hereby apply to have the land described in the above declaration brought under the provisions of the Real Property Act, and request you to issue the Certificate of Title in the name of

Dated at this day of 187 .

Signature of Applicant.

Witness to signature—

N.B.—The annexed Schedule and the certificate indorsed should both be also signed.

* The declaration must be attested by the Registrar General or Deputy, or by a Notary Public, or by a Justice of the Peace. If the signature be by mark, the attestation must state that it was read over to the declarant, that he appeared fully to understand the contents. This applies also to the subjoined direction, particularly if a different person be nominated to receive certificate.

* If to applicant, say "myself." If to other person, write name at full length, with address and occupation. If to two or more, state whether as joint tenants or tenants in common. If to an infant, the age should be stated and verified by certificate of baptism or by statutory declaration. If to a married woman, the name of the husband, together with his residence and occupation should be stated.

SCHEDULE REFERRED TO.*

(To be signed by applicant.)

* For the particulars which this Schedule must comprise, see concluding part of Declaration, to which particular attention is directed, as any omission or mis-statement will render applicant liable to the penalties of false declaration. Such of the deeds and documents as are in applicant's possession or control must be deposited with the application. Counterpart leases must be included; but these will be returned, if required. If any deposited deeds relate also to property not brought under the Act, they may be returned after partial cancellation; but of all these, abstracts or copies for retention should be furnished, and the desire for the return of the originals noted. If the only object be to comply with covenant to produce, parties are reminded that by specially depositing them under the 25th section of the Act 22 Vic. No. 1, such covenant will be finally satisfied.

N.B.—Section 104 requires that the following certificate be signed by applicant or his solicitor, and renders liable any person falsely or negligently certifying to a penalty of £50; also, to damages recoverable by parties injured.

I certify that the within application is correct for the purposes of the Real Property Act.*

* If by solicitor insert—"And that I am the Solicitor of the within-named applicant"; and add his own address to his signature.

FEES.

Payment of these must accompany the application.

1st.—Where the applicant is the original grantee from the Crown.

Commissioners' fee	£0	5	0
New certificate	1	0	0
Sketch (unless furnished)	0	2	6
Add assurance, $\frac{1}{4}$ d. in the pound on declared value	.....	

2nd.—Where the applicant is not the grantee from the Crown, or being the grantee the property has been dealt with by any registered instrument.

	Com- missioners' Fee.	Advertise- ments.	New Certificate.	Total.
If the property is of the value of				
£200 and under—	£0 10 0	£1 10 0	£1 0 0	£3 0 0
" 300	1 0 0	1 10 0	1 0 0	3 10 0
" 400	1 10 0	1 10 0	1 0 0	4 0 0
" 500	2 0 0	1 10 0	1 0 0	4 10 0
Ditto above 500	2 10 0	1 10 0	1 0 0	5 0 0

In addition to the Assurance Fee of $\frac{1}{4}$ d. in the £ on the value; and 2s. 6d. for sketch, if the whole of a Crown grant.

 State to whom all correspondence relating to this application should be sent, with address, as under, viz. :—

Name—
Occupation—
Post Town—

REAL PROPERTY (FORMS).

*New South Wales. (A. 1.)*APPLICATION TO BRING LANDS UNDER THE PROVISIONS OF THE
REAL PROPERTY ACT.

(26 Victoria No. 9.)

Leasehold.*

(Another form can be obtained for fee simple.)

I,^a do solemnly and sincerely declare that^b entitled to ALL
 THAT land situated in^c for^d the residue of the term of
 years created by the lease mentioned in the Schedule hereto and herewith
 deposited, which leasehold estate has become vested in me, subject to the rent, covenants,
 and conditions affecting the same, in manner appearing by the said lease [and the other
 deeds and writings mentioned in the said Schedule]^e and is of the value of^f
 and no more, and is^g of^h originally granted toⁱ
 by Crown Grant, under the Hand of^j Governor of the Colony, dated the
 day of 18 . And I further declare, that I verily believe
 the only person now interested in the said land, in remainder or reversion subject to
 my Estate therein as follows:—^m
 Also, that the rent, covenants, and conditions of the said lease have been duly paid and
 fulfilled on the part of the lessee to the present time. Also, that there does not exist
 any mortgage, underlease, lien, charge, or encumbrance, or any will, settlement, or other
 deed or writing, contract, or dealing giving any right, claim, or interest in the said land
 or any part thereof, as regards the said leasehold estate therein, to any other person
 than myself [*except as follows*]ⁿ
 And I further declare, that there is no person in possession or occupation of the said
 lands adversely to my estate or interest therein, and that the said land is now^o
 and that the owners and occupiers of adjacent lands are as follows^p:—On the
 north owner, and occupier; on the^q and that
 there are no deeds or instruments of title affecting the land to which this application
 relates, in my possession or under my control, other than those enumerated in the
 Schedule hereto: And I make this solemn declaration, conscientiously believing the
 same to be true.

Dated at , this day of 187 .

Made and subscribed by the abovenamed

 this day of } Signature of Applicant.
 in the presence of

To the Registrar General.

I the above declarant, do hereby apply to have the land described in the
 above declaration brought under the provisions of the Real Property Act, and request
 you to issue the Certificate of Title in the name of^r

Dated at this day of 187 .

Signature of Applicant.

Witness to Signature—

N.B.—The annexed Schedule and Certificate indorsed should both be also signed.

- * Here state Christian and Surname in full, with residence and occupation.
- ^a "I am," or "C.D. of is," (as the case may be.)
- ^b Here give description of the property in full. If the land consists of a Crown Grant, a diagram from the Survey Office must be procured—and on payment of a special fee of 5s. accompanying the application, this will be obtained through the Land Titles Department. If the land comprise a portion only of a grant, an accurate plan must accompany the application, either annexed or indorsed. It is always desirable, and in many cases absolutely necessary, that this plan be prepared and certified by one of the Surveyors licensed under the Act.
- ^c State whether the whole or part, and if part define period of underlease.
- ^d Number.
- ^e If applicant be original lessee, omit the words in brackets.
- ^f Here state the present value of the leasehold interest in the land with all improvements.
- ^g State whether "the whole" or "part."
- ^h Insert Allotment with reference to number and section on plan, if any, or, if not, number of acres granted.
- ⁱ Name of Grantee.
- ^j Name of Governor.
- ^k Here give names and addresses of lessor or others now entitled to the freehold.
- ^l If there be any mortgage, underlease, &c., here state the particulars; if none, strike out the words in *Italics*.
- ^m Insert "unoccupied," or "in the occupation of," adding names and addresses of tenants in full.
- ⁿ Here insert name and residences of adjacent owners and occupiers on each side.
- ^o Insert the like particulars as to the other sides of the property.
- ^p The Declaration must be attested by the Registrar General or Deputy, or by a Notary Public, or by a Justice of the Peace, or by a Commissioner for taking affidavits.
- ^q If to applicant, say "myself," if to other person write name at full length, with address and occupation.

REAL PROPERTY (FORMS).

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CAUTION.—By Section 117, any applicant procuring a Certificate through any fraud, error, omission, misrepresentation, or misdescription will notwithstanding the issue of such Certificate remain liable for damages to any person thereby prejudiced. And any person who fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of any Certificate of Title is declared guilty of a misdemeanor, and liable to a penalty not exceeding £500 or imprisonment not exceeding three years; and any Certificate thereby procured is rendered void as between all parties or privies to the fraud.

SCHEDULE REFERRED TO.*

* Insert a list of all deeds and documents relating to the title in applicant's possession, which must be forwarded with the application. Any counterpart underleases must be included, but these will be returned if required.

INDORSEMENT.

I, the within named and undersigned, do hereby certify that the within application is correct for the purposes of the Real Property Act.

Signature of Applicant (or his Solicitor).

CAUTION.—Any person falsely or negligently certifying as above is liable to a penalty of £50. Sec. 104 of R. P. Act.

Case No.

Application of

New South Wales.

CAVEAT FORBIDDING LANDS TO BE BROUGHT UNDER THE REAL PROPERTY ACT.

(26 Victoria No. 9.)

(See Another form of caveat forbidding registration of DEALINGS with land ALREADY UNDER THE ACT may be obtained. See the form post.)

TAKE NOTICE, that I, ^a of ^b claiming estate or interest^c in lands described as^d in notice dated the^e day of 186, advertising the same as land in respect to which claim has been made to have the same brought under the provisions of the Real Property Act, do hereby forbid the bringing of the said land under the provisions of the said Act; and I do appoint^f as the place at which notices relating hereto may be served

Dated this day of 186.
Signed in my presence, this day of 186, } Signature of Caveator or his Attorney.

To the Registrar General of the
Colonry of New South Wales.

N.B.—Section 104 requires that the following certificate be signed by caveator or his solicitor, and renders liable any person falsely or negligently certifying, to a penalty of £50; also, to damages recoverable by parties injured.

I certify that the within Caveat is correct for the purposes of the Real Property Act.*

* If by Solicitor insert :—"And that I am the Solicitor of the within-named Caveator," and add his own address to his signature.

- * Name of Caveator in full.
- * Address and description in full.
- * Here state the nature of the estate or interest claimed, and the facts on which the claim is founded.
- * Here state particulars of description from declaration of applicant or advertisement.
- * Insert date of notice in *Gazette*.
- * State distinctly an address in Sydney at which notices relating hereto may be served.

FEES.

For noting Caveat	...	...	...	...	10s.
For withdrawing or cancelling Caveat	...	...	...	...	5s.

The following information is afforded for guidance of parties in the interior; but for more specific details, reference must be had to the printed circulars which are obtainable at the Land Titles Office, Sydney, upon remitting a fee of one shilling:—

No caveat can be filed or withdrawn until the fees are paid.

Should no caveat be lodged within the prescribed time, the applicant, or should he desire to transfer the land, his nominee, will receive a certificate of title.

Within the time notified in the advertisement, any person having or claiming any interest in the land, or his attorney, may lodge a caveat forbidding the bringing of such land under the provisions of the Act.

Every caveat must particularize the estate, interest, lien, or charge claimed by the person lodging the same, and the Registrar General may require every caveator to deliver a full and complete abstract of his title.

REAL PROPERTY (FORMS).

The lodging of a caveat suspends all further action in the matter, until the caveat be withdrawn or lapses, or until a decision has been obtained from the Supreme Court. (See s. 23, Real Property Act.)

Every caveat lapses at the expiration of three months from the receipt thereof, unless the caveator shall within that time have taken proceedings in some Court of competent jurisdiction to establish his title to the estate, interest, lien, or charge therein specified, and shall have given written notice thereof to the Registrar General, or shall have obtained from the Supreme Court an order or injunction restraining the Registrar General from bringing the land therein referred to under the provisions of this Act. (Sec. 23.)

A caveat may be withdrawn at any time by a caveator. (See sec. 81.)

Sec. 84 provides that any person lodging any caveat with the Registrar General without reasonable cause, shall be liable to make to any person who may have sustained damage thereby such compensation as may be just; and such compensation shall be recoverable in an action at law, by the person who has sustained damage, from the person who lodged the caveat.

Any opposing claim will be excluded, unless caveat be lodged within the time limited, as by omission to lodge, or allowing lapse of caveat after notice or with knowledge of application, claim on assurance fund is forfeited. (Sec. 122.)

No.

New South Wales.

APPLICATION BY OFFICIAL ASSIGNEE OF INSOLVENT ESTATE TO BE REGISTERED UNDER SECTION 75A OF THE REAL PROPERTY ACT, 26 VIC. No. 9.

I^a being Official Assignee of the Insolvent Estate of^c duly appointed by the order of His Honor Mr. Justice whereof an office copy is herewith deposited,^d hereby apply to be registered as proprietor of the estate or interest hitherto held by the said Insolvent, in all that piece of land, being^e of the land described in registered Vol. Folio herewith deposited.^f Also all that

Dated this day of 18 .

Signed in the presence of

} Signature of Applicant.

(Who will also sign Indorsement.)

^a Before registering any dealing, the Official Assignee should take out a new certificate in his own name, to preserve continuity of title.

^b Name of Applicant.

^c Name and occupation of Insolvent.

^d This deposit is required by sec. 75.

^e The whole or part, as the case may be. If a part, add or annex a description and sketch. If the whole, the reference to the register will suffice.

^f If the Official Assignee be not in possession of the grant or certificate, he should state by a separate letter or declaration what means he has taken to obtain such possession, and if it be wrongfully withheld, a summons may be applied for, under section 126 of the R. P. Act.

^g Add other parcels, if any.

INDORSEMENT.

I, the within named and undersigned, do hereby certify that the within application is correct for the purposes of the Real Property Act.

Signature of Applicant (or his Solicitor).

N.B.—Dower in any wife of his should be negatived by separate declaration or certificate.

NOTE.—The Act declares that the Assignee shall hold the land subject to the equities upon and subject to which the insolvent held the same, but for the purpose of any dealings under the Act shall be deemed absolute proprietor. If therefore the insolvent held the property under any trust, express or constructive, the Assignee, if he have notice thereof, will hold it on the same trust; and although any dealing in violation thereof may be legal to confer a title, he would be answerable to any person defrauded or injured.

CAUTION.—Any person falsely or negligently certifying as above is liable to a penalty of £50. Sec. 104 of R. P. Act.

No.

New South Wales.

APPLICATION TO BE REGISTERED UNDER THE REAL PROPERTY ACT (26 VICTORIA No. 9, SECTION 79), AS PROPRIETOR BY TRANSMISSION.

I,^a do solemnly and sincerely declare, that I verily believe myself to be entitled for an estate [*in fee simple*]^b to the land described in the Certificate of Title

^a Christian and surname in full, with residence and occupation.

^b If a less estate, alter to accord with the fact.

REAL PROPERTY (FORMS).

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held by deceased (vol. folio) herewith deposited and surrendered,—
I having become so entitled as^a

In further verification whereof, I have deposited the documents enumerated in the Schedule hereto. I also declare that the said land is now of the value of^a pounds sterling, also that no other person is within my knowledge entitled to any estate or interest in the said land [except as follows :]^a and I make this solemn declaration, conscientiously believing the same to be true.

Dated at the day of 187 .

Made and subscribed by the abovenamed

the day of

187 ,

} Signature of Applicant.

in the presence of

N.B.—Since the passing of the Act 25 Vic. No. 20, the executor or administrator will be entitled in exclusion of the heir-at-law, and the devolution to the heir will be limited to entails.

CAUTION.—By section 117, any applicant procuring a Certificate through any fraud, error, omission, misrepresentation, or misdescription will, notwithstanding the issue of such certificate, remain liable for damages to any person thereby prejudiced. And any person who fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of any Certificate of Title, is declared guilty of a misdemeanor, and liable to a penalty not exceeding £500, or imprisonment not exceeding three years; and any certificate is rendered void as between all parties or privies to the fraud.

^a Heir or devisee, or as the case may be,—with any required explanation of particulars.

^a Present value, inclusive of all improvements.

^a State particulars of any mortgage, lease, &c.; if none, strike out the words in brackets.

^a The declaration must be attested by the Registrar General or Deputy, or by a Notary Public, or by a Justice of the Peace, or by a Commissioner for taking Affidavits.

SCHEDULE OF DOCUMENTS DEPOSITED.

(The following is required under s. 79 :—Certificate of death of deceased proprietor, and statutory declaration or other evidence negating dower of any widow. If he died intestate, letters of administration. If the claim be by devise, original office copy or probate of the will. If made under settlement, the original should be deposited.)

I, the within named and undersigned do hereby certify that the within application is correct for the purposes of the Real Property Act.

(This Schedule must be signed by the applicant.)

Signature of Applicant (or his Solicitor).

CAUTION.—Any person falsely or negligently certifying as above is liable to a penalty of £50. Sec. 104, of R.P.A.

New South Wales.

MEMORANDUM OF TRANSFER.

(26 Victoria, No. 9.)

Fee Simple.

Dower should be negated, or the contingent interest will be noted on the new certificate. A statutory declaration should accompany, stating whether the transferor be married, and, if so, the date of marriage. If before January, 1837, the wife must execute and acknowledge a release. A form for the latter purpose can be obtained at the Land Titles Office, or will be forwarded on application. If the marriage were since 1836 no dower attaches.

No alteration should be made by erasure. The words rejected should be scored through with the pen, and those substituted written over them, the alteration being verified by signature or initials in the margin, or noticed in the attestation.

I,^a being registered as the proprietor of an estate *in fee simple*^b in the land hereinafter described, subject, however, to such encumbrances, liens, and interests as are notified by memorandum underwritten or indorsed hereon,^c—in consideration of^d (£) paid to me by^e the receipt whereof I hereby acknowledge, do hereby transfer to the said^f all my estate and interest, as such registered proprietor, in all that piece of land containing^g situated in^h

^a Name, residence, occupation, or other designation in full.

^b If a less estate, strike out "*in fee simple*" and interline the required alteration.

^c All subsisting encumbrances must be noted hereon.

^d If the consideration be not pecuniary, alter accordingly. The true amount must always be stated, for the purpose of determining the Stamp Duty.

^e Name, residence, occupation, or other designation of transferee. If a minor, state of what age, and forward certificate or declaration as to date of birth. If a married woman, state name, residence, and occupation of husband.

^f If to two or more, state whether as joint tenants or tenants in common.

^g Area in acres, roods, or perches.

^h Parish or town, county.

REAL PROPERTY (FORMS).

being^d of the land comprised in dated registered
volume No. folio^k

In witness whereof, I have hereunto subscribed my name, at the
day of in the year of our Lord one thousand eight hundred and

Signed in my presence by the said
who is personally known to me

} Transferor.*
(*Who will also sign Declaration in accordance
with Dower Note at top.)

Signed^a

† Accepted, and I hereby certify this Transfer to be correct
for the purposes of the Real Property Act.

Signed in my presence by the said
who is personally known to me

} Transferee.^o

(† The above may be signed by the solicitor when the signature of
transferee cannot be procured. See note o at foot.

† If signed by virtue of any power of attorney, the original must be produced, and an attested copy be
deposited, accompanied by the usual declaration that no notice of revocation has been received.

MEMORANDUM OF ENCUMBRANCES, &C., REFERRED TO.^pFORM OF DECLARATION BY ATTESTING WITNESS.^q

Appeared before me, at the day of one thousand eight
hundred and the attesting witness to this instrument, and declared
that he personally knew^r the person signing the same, and whose signature
thereto he has attested; and that the name purporting to be such signature of the
said^s is his own handwriting; and that he was of sound mind, and freely
and voluntarily signed the same.

Signed^a

^l "The whole," or "part," as the case may be.

^j "Crown grant," or "certificate of title."

^k Repeat, if more than one. These references will suffice, if the whole land in the grant or certificate
be transferred. But if a part only (unless a plan has been deposited, in which case a reference to the
No. of allotment and No. of plan will be sufficient), a description and plan will be required, and may be
inserted or annexed with this prefix,—"*as delineated in the plan hereon (or annexed hereto) and described
as follows, viz.*" Here also should be set forth any right-of-way, or easement, or exception, if there be
any such, not fully disclosed either in the principal description or memorandum of encumbrances. Any
provisions in addition to or modification of the covenants implied by the Act, may also be inserted.

^m If this instrument be signed or acknowledged before the Registrar General, or Deputy Registrar
General, or a Notary Public, a J.P., or Commissioner for Affidavits, to whom the transferor is known, no
further authentication is required. Otherwise the attesting witness must appear before one of the above
functionaries to make a declaration in the annexed form. This applies to instruments signed within the
Colony. As to those signed elsewhere, see the Act, section 94. If the transferor signs by a mark, the
attestation must state—"that the instrument was read over or explained to him, and that he appeared
fully to understand the same."

ⁿ Repeat attestation for additional parties if required.

^o For the signature of the transferee hereto, an ordinary attestation is sufficient, unless the instrument
contain some special covenant by the transferee; his signature will be dispensed with *in cases where it
is established that it cannot be procured without difficulty*. It is, however, always desirable to afford a
clue for detecting forgery or personation, and for these reasons it is essential that the signature should,
if possible, be obtained.

^p See note c. This when filled up should be signed by the transferor. A very short note of the
particulars will suffice.

^q May be made before either Registrar General, Deputy Registrar General, a Notary, J.P., or Commis-
sioner for Affidavits. Not required if the instrument itself be made or acknowledged before one of these
parties.

^r Name of witness and residence.

^s Name of transferor.

^t Name of transferee.

^u Registrar General, Deputy, Notary, J.P., or Commissioner for Affidavits.

No. MEMORANDUM OF TRANSFER OF

Vendor.

Purchaser.

Particulars entered in the Register Book, Vol.

Folio

the

day of

18 .

Registrar General.

The following information is afforded for guidance of parties in the interior :—

No transfer can be registered until the fees are paid.

If the transfer embraces the *whole* of the land contained in a Crown grant or certifi-
cate, the transfer may be endorsed in a short form (see Schedule to Act).

But whether indorsed or not, the certificate of Crown grant must, in every case, accompany, and cannot be returned.

If a part only be transferred, and it is desired to have a certificate for the remainder, this should be stated, and a new certificate will then be prepared on payment of an additional 20s.; but, to save this expense, if it be intended to make several transfers of portions, the certificate may remain in the Land Titles Office, either until the whole be sold, or formal application be made for a certificate of the subsisting residue.

Tenants in common *must* receive separate certificates. 20s. additional must be remitted for each certificate.

The fees on transfer are 10s., and 20s. for *every* new certificate, whether issued to a transferee or required for the residue. By the Amendment Act of 1873 the purchaser is not compelled to take out a certificate of title, when the whole of the land is transferred he may have the original title returned to him with a memorial of his transfer endorsed thereon at a cost of 10s. only.

The transfer is complete from the moment it is recorded.

Certificates will only be delivered on personal application of purchasers or their solicitors, or upon an order attested before a Magistrate. If the parties reside in the country this should accompany the transfer, to avoid delay.

N.B.—All lands granted from the Crown since 1st January, 1863, are, *ipso facto*, under the provisions of the Real Property Act, and must be dealt with in the forms prescribed by that Act.

F.

New South Wales.

MEMORANDUM OF LEASE.

(26 Victoria, No. 9.)

[In duplicate.]

I^a, being registered as the proprietor of an estate in *fee simple*^b in the land hereinafter described, subject, however, to such encumbrances, liens, and interests as are notified by memorandum underwritten or endorsed hereon: Do hereby lease unto^c

all that piece of land containing ^d	situated in	being ^e
of the land comprised in ^f	dated	A.D. 18
registered Volume	Folio	(£)
To be held by	the said	as tenant for the term of
years computed from the	day of	At the yearly rent of ^g
pounds (£)	payable as follows ^h	subject to the following covenants,
conditions, and restrictions, viz. :—		

1. To the covenants and powers impliedⁱ in every memorandum of lease by virtue of the Real Property Act, sec. 51, or such of them, or so far, as not hereby expressly negatived or modified.
2. To the full effect of the covenants next hereinafter shortly noted, as the same are set forth in words at length in sec. 65 of the said Act,¹

^a Name, residence, occupation, or other designation of lessor.

^b If a less estate, strike out "in *fee simple*," and interline required alteration.

^c Name, &c., of lessee.

^d Acres, roods, and perches.

^e The whole, or part, as the case may be.

^f Crown grant or certificate of title.

^g These references will suffice alone if the whole land in the grant or certificate be leased; but if the lease be of a part, a surveyor's description and plan will be required, which will then follow here with this prefix :—"as delineated in the plan hereon (or hereunto annexed), and described as follows"

Add also, if intended, any rights of way or other easements, and any exceptions, if intended, of mines or minerals, timber, &c. If the plan or description be annexed, the annexure should be identified as part of this instrument, by a memorandum thereon referring hereto, and signed by the same parties and witnesses.

^h State both in words and figures.

ⁱ Here insert times of payment.

¹ These relate on the part of the tenant to payment of rent and repair; on the part of the lessor to right of entry to inspect repairs, and of re-entry and forfeiture of lease after six months default in payment of rent or fulfilment of covenants.

² Here insert any of the following, suited to the case. To understand the full effect of each *refer to the Act*. "That the lessee will insure." "That he will paint outside every alternate year." "That he will paint and paper every third year." "That he will fence." "That he will cultivate." "That he will not use the premises as a shop." "That he will not carry on offensive trades." "That he will not without leave assign or sublet." "That he will not cut timber." "That he will carry on the business of a publican, and conduct the same in an orderly manner." "That he will apply for a renewal of license." "That he will facilitate the transfer of license."

REAL PROPERTY (FORMS).

8. To the following special additional provisions,^m viz. :—

I^a, do hereby accept this lease as tenant, subject to the conditions, restrictions, and covenants above set forth.

Dated this day of one thousand eight hundred and

Signed by the said	}	
who is personally known to me, in my presence ^o		Lessor.
Signed by the said		
who is personally known to me, in my presence ^o		Lessee.

(Who or his Solicitor will also sign indorsement.)

Signed*

* Similar authentication is required of transferor's signature as to that of lessor to the lease; also certificate of correctness, signed by transferee or his solicitor; as to which see marginal note o, and preceding forms of attestation, declaration, and certificate.

A.

DECLARATION BY ATTESTING WITNESS.

Appeared before me^p at , the day of , one thousand eight hundred and , the attesting witness to this instrument, and declared that he personally knew^q , the person signing the same, and whose signature thereto he has attested; and that the name purporting to be such signature of the said^a is his own handwriting; and that he was of sound mind, and freely and voluntarily signed the same.

N.B.—If by the signing of two or more Lessors before different witnesses it become necessary to make more than one declaration, it can be entered on the space opposite (if not otherwise occupied), or on the back. For signature of the Lessee an ordinary attestation is sufficient.

No. Memorandum of lease of (Must be signed by Lessee, or the next form by his Solicitor.)

I, [or we] the within mentioned and undersigned, do hereby certify that the within instrument is correct for the purposes of the Real Property Act:

I hereby certify, that I am the solicitor of the within named and that the within instrument is correct for the purposes of the Real Property Act.

Particulars entered in the Register Book, Vol. Folio , the day of 18 .

Registrar General.

[Signature.]
[Address]
[Date]

CAUTION.—Section 104, which requires the above, renders persons certifying falsely or negligently subject to a penalty of £50, besides damages to any parties injured.

^m Here add any other terms of the intended lease.

^a Name of lessee.

^p Unless the signature of the lessor be made or acknowledged before the Registrar General, or his Deputy, or a Notary Public, J.P., or Commissioner for Affidavits, the witness must appear before one of the above functionaries to make a declaration in the annexed form A. This applies to instruments signed within the Colony. As to those signed elsewhere, see the Act, section 94, and par. 10 of circular No. 2. If a signature be by a mark, the attestation must state that the instrument was read over or fully explained to the party, and that he appeared fully to understand the same.

^q May be before either Registrar General, his Deputy, a Notary, a J.P., or a Commissioner for Affidavits. Not required if the instrument itself be signed or acknowledged before one of these. See note o.

^o Name of witness and residence.

^r Name of lessor.

^s Name of lessor.

FORM OF TRANSFER.

I, [or we] the within named in consideration of pounds (£) this day paid to by , the receipt of which sum hereby acknowledge, do hereby transfer to the estate or interest of which registered proprietor, as set forth in the within memorandum of lease, together with all rights, and powers in respect thereof. In witness whereof, have hereunto subscribed name this day of 18 .

Signed*

Accepted,

* Repeat attestation for additional parties, if required.

REAL PROPERTY (FORMS).

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FORM OF SURRENDER.

I, _____, registered proprietor of the lease created by the within instrument, do hereby, in consideration of _____, surrender all my estate or interest therein to the lessor or other the present owner of the reversion thereon expectant.

In witness whereof, I have hereto subscribed my name this _____ day of _____

Signed†

Accepted,

† *Mutatis mutandis*, the same rules of authentication apply as to lease and transfer. See note * at foot of page 126.

New South Wales.

MEMORANDUM OF MORTGAGE.

(26 Victoria, No. 9.)

DOWER.—If the Mortgagor's wife be entitled to dower, and it be intended she should release it, a form can be obtained for this purpose as an annexure.

[Must be in duplicate, one copy to be filed, and the other retained by the Mortgagee.]

The Crown Grant or Certificate of Title must be presented herewith, in order that this Mortgage may be noted thereon.

I^a, _____, being registered as the proprietor of an Estate *in fee simple*^b in the land hereinafter described, subject, however, to such encumbrances, liens, and interests, as are notified by memoranda underwritten or endorsed hereon,^c—in consideration of _____ pounds (£ _____) lent to _____ by^d _____ the receipt whereof _____ hereby acknowledge, do, for the purpose of securing to _____ the payment in manner hereinafter mentioned of the said principal sum and interest thereon, hereby mortgage to the said _____ ALL my Estate and Interest, as such registered proprietor as aforesaid in ALL THAT piece of land containing^e _____ situated in^f _____ being the whole of the land comprised in^g _____ dated _____ registered Volume _____ Folio _____ also ALL THAT PIECE of

land^h _____ and for the consideration aforesaidⁱ, _____ do hereby covenant with the said _____ FIRSTLY—That^k _____ will pay to _____ the above sum of _____ pounds (£ _____) on the _____ day of _____ SECONDLY—That _____ will pay interest on the said sum at the rate of _____ pounds (£ _____) by the £100 in the year as follows:— THIRDLY—That _____ in the event of loss, the sum recoverable on account of such insurance shall be applicable either in or towards repair or rebuilding, or in or towards repayment of the mortgage debt, at the option of the Mortgagee. FOURTHLY—

In witness whereof _____ have hereto subscribed _____ name at _____ the day of _____ in the year of our Lord _____

Signed in my presence by the said _____ } Mortgagor.
who is personally known to me^a
Signed^a

^a Name, residence, occupation, or other description in full. If more than one, insert we, and make the other alterations required throughout. No alterations should be made by erasure. The words rejected should be scored through with the pen, and those substituted written over them, the alteration being verified by signature or initials in the margin, or noticed in the attestation.

^b If a less estate, strike out "*in fee simple*," and interline the required alteration.

^c All prior subsisting encumbrances must be thus noted.

^d Name, residence, &c., of Mortgagee.

^e Area, in acres, roods, or perches.

^f Parish, town, county.

^g "Crown Grant," or Certificate of Title.

^h Repeat if more than one. No description beyond these references is required, unless the land be subdivided, in which case a surveyor's description and plan are necessary.

ⁱ I or we and name.

^k If two or more, interline (if intended) jointly and severally.

The mere words "I will ensure," with a statement of the amount, are sufficient to imply all the usual provisions contained in covenants for insurance, except that which follows, and which is usual in mortgages. If no insurance be intended, strike the pen through this covenant.

Here add, if intended, any special covenants or modifications of covenants or powers implied by the Real Property Act in every mortgage.

If this instrument be signed or acknowledged before the Registrar General or Deputy Registrar General, or a Notary Public, a J.P., or Commissioner for Affidavits, to whom the Mortgagor is known, no further authentication is required. Otherwise the ATTESTING WITNESS must appear before one of the above functionaries to make a declaration in the annexed form. This applies to instruments signed within the Colony. As to those signed elsewhere, see the Act, section 94. If the Mortgagor signs by a mark, the attestation must state "that the instrument was read over or explained to him, and that he appeared fully to understand the same."

Repeat attestation for additional parties, if required.

REAL PROPERTY (FORMS).

Accepted, and I hereby certify this Mortgage to be correct for the purposes of the Real Property Act.

Signed in my presence by the said _____ } Mortgagee.^p
who is personally known to me

* (Who will also sign endorsement.)

The above may be signed by a Solicitor when signature of Transferee cannot be procured.—See note c.

MEMORANDUM OF PRIOR ENCUMBRANCES, &C., REFERRED TO.^qFORM OF DECLARATION BY ATTESTING WITNESS.^r

Appeared before me, at _____, the _____ day of _____, one thousand eight hundred and _____, the attesting witness to this instrument, and declared that he personally knew _____ the person signing the same, and whose signature thereto he has attested; and that the name purporting to be such signature of the said _____ is his own handwriting, and that he was of sound mind, and freely and voluntarily signed the same.

Signed

No. _____ Mortgage of _____ in _____ Mortgagee.
Particulars entered in the Register Book, Vol. _____ Folio _____
day of _____ 18 _____ the

Registrar General.

FORM OF TRANSFER.

I, or we, the within-named _____ in consideration of _____ pounds (£ _____) this day paid to _____ by _____ the receipt of which sum _____ hereby acknowledge, do hereby transfer to _____ the estate or interest of which _____ registered proprietor as set forth in the within Memorandum of Mortgage, together with all _____ rights and powers in respect thereof.

In witness whereof, _____ have hereunto subscribed name at _____ this day of _____ 187 _____

Signed in my presence by the said _____ } Transferrer.
who is personally known to me _____ } Transferee.

^p For the signature of the Mortgagee hereto, an ordinary attestation is sufficient; unless the instrument contain some special covenant by the mortgagee, his signature will be dispensed with, in cases where it is established that it cannot be procured without difficulty. It is, however, always desirable to afford a clue for detecting forgery or personation, and for these reasons it is essential that the signature should, if possible, be obtained.

^q See note c. This when filled up should be signed by the Mortgagee. A very concise note of the particulars will suffice.

^r May be made before either Registrar General, Deputy Registrar General, a Notary, J.P., or Commissioner for Affidavits. Not required, if the instrument itself be made or acknowledged before one of these parties.

* Name of witness and residence.

* Name of Mortgagee.

* Name of Mortgagee.

* Registrar General, Deputy, Notary, J.P., or Commissioner for Affidavits.

FORM OF DISCHARGE.

Received from _____ this _____ day of _____ the sum of _____ being in full satisfaction and discharge of the within obligation.
Signed in my presence by the said _____ } Mortgagee.
who is personally known to me _____ }

† The same requirement of attestation and authentication will apply to a transfer or discharge by the Mortgagee, as to the creation of the Mortgage by the Mortgagee, as to which see note c.

FEEs (to accompany documents):—Mortgage, 10s.; transfer of ditto, 10s.; discharge of ditto, 10s.; and 2s. for every Crown Grant or Certificate of Title after the first.

REAL PROPERTY (FORMS).

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New South Wales. (H 1.)

MEMORANDUM OF ENCUMBRANCE (IN DUPLICATE).

(26 Victoria, No. 9.)

For securing annuity or other ascertained payments of money, other than an ordinary mortgage debt. If the Encumbrance be for contingent purposes or by way of indemnity, another form (H 2) will apply.

63 This form, as printed, comprises the *whole* land in any grant or certificate, or the whole lands in several grants or certificates; for encumbrance of a part it may be adapted as directed in note h.

Generally, however, it will be found more convenient, before encumbering a part, to obtain a separate certificate (under section 97) for that portion, and another for the portion remaining unencumbered.

DOWER.—If the encumbrancer's wife be entitled to dower, and it be intended she should release it, a form can be obtained for this purpose as an annexure.

I, ^a being registered as the proprietor of an estate *in fee simple*^b in the land hereinafter described, subject, however, to such encumbrances, liens, and interests as are notified by memorandum under-written or endorsed hereon,^c in all that piece of land containing^d situated in^e being the whole^f of the land comprised in^g dated registered volume folio

Also all that piece of land^h And desiring to render the said land available for the purpose of securing to and for the benefit ofⁱ the^k hereinafter mentioned, do hereby encumber the said land for the benefit of the said with the^k of pounds (£) to be raised and paid at the times and in the manner following, that is to say:—^l To the intent that the said may be entitled to the benefit of all the powers and remedies implied or given in favour of an encumbrance by the Real Property Act, with the qualifications or additions following, viz.:—^m

In witness whereof have hereunto subscribed name at the day of in the year of our Lord

Signed in my presence by the said } Encumbrancer.
who is personally known to meⁿ

Signed^o

Accepted by me,

Signed in my presence by the said } Encumbrancee.^p
who is personally known to me }
(Who will also sign Indorsement.)

MEMORANDUM OF PRIOR ENCUMBRANCE, &c., REFERRED TO.^q

^a Name, residence, occupation, or other description in full. If more than one, insert "we," and make the other alterations required throughout. No alterations should be made by erasure. The words rejected should be scored through with the pen, and those substituted written over them, the alteration being verified by signature or initials in the margin, or noticed in the attestation.

^b If a less estate, strike out "*in fee simple*," and interline the required alteration.

^c All prior subsisting encumbrances must be thus noted.

^d Area, in acres, rods, or perches.

^e Parish, town, county.

^f See note above *63*

^g "Crown Grant" or "Certificate of Title."

^h Repeat if more than one. No description beyond these references is required, unless the land be subdivided, in which case a surveyor's description and plan are necessary, but if thereupon a separate certificate be obtained as above recommended, (*63*) reference thereto will be sufficient, otherwise this form must be altered by striking out "the whole" and interlining "a part," followed by the full description and plan, or annexing them if requisite. But every annexure should be identified with the original instrument, by memorandum referring thereto, signed by the same contracting and attesting parties.

ⁱ Name, residence, and occupation, or other designation of Encumbrancee.

^j Annuity or other designation of intended Encumbrance.

^k Set forth times and mode of payment.

^l Insert any such, if intended. In the Mortgage Form there are covenants to pay, and to insure—but as these are not matters of course in encumbrances of other kinds, their insertion is left discretionary.

^m If the instrument be signed or acknowledged before the Registrar General or Deputy Registrar General, a Notary Public, a J.P., or Commissioner for Affidavits, no further authentication is required; otherwise the witness must appear before one of the above functionaries to make a declaration in the annexed form. This applies to instruments signed within the Colony. As to those signed elsewhere, see the Act, section 91. If the Encumbrancer signs by a mark, the attestation must state that the instrument was read over or explained to him, and that he appeared fully to understand the same.

ⁿ Repeat attestation for additional parties, if required.

^o For the signature of the Encumbrancee hereto an ordinary attestation is sufficient, but any release or transfer by him will require the authentication above mentioned as required for encumbrancers.

^p See note ^a. This when filled up should be signed by the Encumbrancer. A very concise note of the particulars will suffice.

REAL PROPERTY (FORMS).

FORM OF DECLARATION BY ATTESTING WITNESS.*

Appeared before me, at _____, the _____ day of _____, one thousand eight hundred and _____, the attesting witness to this instrument, and declared that he personally knew[†] the person signing the same, and whose signature thereto he has attested; and that the name, purporting to be such signature of the said _____ is his own handwriting; and that he was of sound mind, and freely and voluntarily signed the same.

[Certificate required by Section 104, which must be signed by the encumbrancee, or the next form by his solicitor.]

No. _____
in _____

Encumbrancer.

Encumbrancee.

I, [or we] the within mentioned and undersigned, do hereby certify that the within memorandum of encumbrance is correct for the purposes of the Real Property Act.

[Signature.]

Or,
I hereby certify, that I am the Solicitor of the within named _____ and that the within instrument is correct for the purposes of the Real Property Act.

[Signature.]

[Address.]

[Date.]

Particulars entered in the Register Book,
Vol. _____ Folio _____ the _____
day of _____ 186 .

Registrar General.

CAUTION.—Any person falsely or negligently certifying is liable to a penalty of £50, besides damages to parties injured.

* May be made before either Registrar General, Deputy Registrar General, a Notary, J.P., or Commissioner for Affidavits.

† Name of witness and residence.

† Name of Encumbrancer.

† Name of Encumbrancee.

FORM OF TRANSFER.

I, [or we] the within named _____ in consideration of _____ pounds (£ _____) this day paid to _____ by _____ the receipt of which sum _____ hereby acknowledge, do hereby transfer to _____ the estate or interest of which registered proprietor as set forth in the within memorandum of encumbrance, together with all _____ rights and powers in respect thereof. In witness whereof, have hereunto subscribed _____ name _____ at _____ this day of _____ 186 .

Signed*

* Similar attestation, authentication, and certificate of correctness required as to original encumbrance, as to which see preceding forms and marginal notes n and p. The circumstances applying to a discharge of encumbrance are too variable to admit of a general form.

DISCHARGE.†

† If the satisfaction be by money payment in full, the same discharge which is endorsed on the Mortgage Forms will apply. In other cases proof of death of annuitant, and of payment to date thereof to his representatives will be necessary. With regard to attestation, &c., see above note to Form of Transfer*, which will equally apply to Discharge.

Fees (to accompany documents):—Encumbrance, 1's.; Transfer of ditto, 10s.; Discharge of ditto, 10s.; and 2s. for every Crown Grant or Certificate of Title after the first.

New South Wales.

MEMORANDUM OF ENCUMBRANCE (IN DUPLICATE). H (2.)

(26 Victoria, No. 9.)

For fulfilment of terms of a separate instrument. For securing annuities and ascertained payments. Form H (1) may be in general used, but if there be any special and lengthy provisions, this Form (H 2) will be preferable. By its means the statutory encumbrance may be adapted to cash credits, contingent indemnities to sureties, and all other varieties of security. The detailed provisions may be contained in a separate deed, which may, although not annexed or registered, be deposited for safe custody, under sect. 66. This instrument simply confers the legal powers of encumbrancee, without imposing on persons claiming title under him any liability to ascertain the facts on which the propriety of their exercise depends.

If any check on the acts of the encumbrancee be stipulated for, it may be provided by entry of a caveat. ~~27~~ This form comprises, as printed, the whole land in any grant or certificate, or the whole lands in several grants or certificates; for encumbrance of a part, it may be adapted, if requisite, as directed in marginal note h.

Generally, however, it will be found more convenient, before encumbering a part, to obtain a separate certificate for that portion (under section 97), and another for the portion remaining unencumbered.

DOWER.—If the encumbrancer's wife be entitled to dower, and it be intended she should release it, a form can be obtained for this purpose as an annexure.

I,^a being registered as the proprietor of an estate *in fee simple*^b in the land hereinafter described, subject, however, to such encumbrances, liens, and interests as are notified by memorandum under-written or endorsed hereon,^c in all that piece of land containing^d situated in^e being the whole^f of the land comprised in^g dated registered volume folio Also all that piece of land^h And desiring to render the said land available for securingⁱ against any default in observance of the terms and conditions of the^k hereinafter referred to, hereby covenant with the said for the due observance of all such terms and conditions, and declare that upon any default therein, the said shall have and exercise all the powers of encumbrancee.

And I hereby declare that this encumbrance is intended to secure^l according to the terms and conditions more fully expressed in a dated and made between and which, for the purpose of ascertaining the respective rights of the parties thereto as between themselves, and of determining the application of any moneys to be raised under the powers hereby conferred, is to be considered as a part of this instrument, whether hereto annexed or not. But as regards the right of all persons claiming title under any act or instrument purporting to be in exercise of the said powers, and to be consequent on any alleged default in observance of the said terms and conditions, or of any covenant hereby entered in reference thereto, I hereby expressly declare that every such act or instrument shall, without the necessity of any statement of particular circumstances, be, of itself, conclusive evidence of the fact of such default, and of the fulfilment of all other preliminary conditions, by notice or otherwise (if any), required for giving full effect to every such act or instrument, and for excluding all objection to registration thereof.

In witness whereof have hereunto subscribed name at the day of in the year of our Lord

Signed in my presence by the said }
who is personally known to me } Encumbrancer.
Signedⁿ

Accepted by me, }
Signed in my presence by the said } Encumbrancee.^o
who is personally known to me }

MEMORANDUM OF PRIOR ENCUMBRANCES &C., REFERRED TO.^p

FORM OF DECLARATION BY ATTESTING WITNESS.^q

Appeared before me, at the day of one thousand eight hundred and the attesting witness to this instrument, and

^a Name, residence, occupation, or other description in full. If more than one, insert We, and make the other alterations required throughout. No alterations should be made by erasure. The words rejected should be scored through with the pen, and those substituted written over them, the alteration being verified by signature or initials in the margin, or notice in the attestation.

^b If a less estate, strike out "*in fee simple*," and interline the required alteration.

^c All prior subsisting encumbrances must be thus noted.

^d Area, in acres, roods, or perches.

^e Parish, town, county..

^f See note above ~~23~~

^g "Crown Grant" or Certificate of Title.

^h Repeat if more than one. No description beyond these references is required, unless the land be subdivided, in which case a surveyor's description and plan are necessary. No alteration herein will be necessary if thereupon a separate certificate be obtained as above recommended (~~23~~); otherwise this form must be altered by striking out "*the whole*" and inserting "*a part*," followed by insertion of the full description and plan, or annexing them if requisite. But every annexure should be identified with the principal instrument, by memorandum referring thereto, signed by the same contracting and attesting parties.

ⁱ Name, residence, and occupation, or other designation of encumbrancee.

^j Cash credit bond, or as the case may be.

^k Here state generally the object of the security.

^l If this instrument be signed or acknowledged before the Registrar General, or Deputy Registrar General, or by a Notary Public, a J.P., or Commissioner for Affidavits, no further authentication is required; otherwise the attesting witness must appear before one of the above functionaries to make a declaration in the annexed form. This applies to instruments signed within the Colony. As to those signed elsewhere, see the Act, section 24, and par. 10 of circular No. 2. If the encumbrancer signs by a mark, the attestation must state that the instrument was read over or explained to him, and that he appeared fully to understand the same.

^m Repeat attestation for additional parties, if required.

ⁿ For the signature of the encumbrancee hereto an ordinary attestation is sufficient, but any release or transfer by him will require the authentication above mentioned as required for encumbrancers.

^o See note c. This when filled up should be signed by the encumbrancer. A very concise note of the particulars will suffice.

^p May be made before either Registrar General, Deputy Registrar General, a Notary, J.P., or Commissioner for Affidavits. Not required if the instrument itself be made or acknowledged before one of these.

^q Name of witness and residence.

REAL PROPERTY (FORMS).

declared that he personally knew^a the person signing the same, and whose signature thereto he has attested; and that the name, purporting to be such signature of the said^b is his own handwriting, and that he was of sound mind, and freely and voluntarily signed the same.

Signed^a

No. encumbrance of
in

Encumbrancer.

Encumbrancee.

Particulars entered in the Register
Book, Vol. Folio the
day of 187 .

Registrar General.

(Certificate required by section 104, which must be signed by the encumbrancee, or the next form by his solicitor.)

I, [or we] the within mentioned and undersigned do hereby certify that the within instrument is correct for the purposes of the Real Property Act :

Or

I hereby certify that I am the solicitor of the within named and that the within instrument is correct for the purposes of the Real Property Act.

[Signature]

[Address]

[Date]

CAUTION.—Any person falsely or negligently certifying is liable to a penalty of £50, besides damages to parties injured. Section 104.

^a Name of encumbrancer.

^b Name of encumbrancee.

^c Registrar General, Deputy, Notary, J.P., or Commissioner for Affidavits.

FORM OF TRANSFER.

I, [or we] the within named in consideration of pounds (£)
this day paid to by the receipt of which sum hereby
acknowledge, do hereby transfer to the estate or interest of which registered
proprietor as set forth in the within Memorandum of Encumbrance, together with
all rights and powers in respect thereof.

In witness whereof have hereunto subscribed name at this
day of 187 .

Signed^a

^a Similar attestation, authentication, and certificate of correctness required as to original encumbrance as to which see preceding forms and notes k and m.

DISCHARGE.[†]

[†] The circumstances applying to discharge of encumbrance are too variable to admit of a general form. If the encumbrance be satisfied by a money payment in full, the same discharge which is indorsed on the mortgage form will apply. With regard to attestation, &c., see above note to Form of Transfer^a which will equally apply to discharge.

Fees (to accompany documents):—Encumbrance, 10s.; transfer of ditto, 10s.; discharge of ditto, 10s.; and 2s. for every Crown Grant or Certificate of Title after the first.

Ia. Limited to Specific Property.

(Another form is supplied where the Power is general.)

New South Wales.

POWER OF ATTORNEY.

(26 Victoria, No. 9.)

I, do hereby appoint^a attorney to sell to any person all or any of the lands^b belonging to me, under or by virtue of the Real Property Act, which are described or referred to in the Schedule hereunder written. Also, to mortgage or otherwise encumber the same respectively, for securing any sum at any rate of interest, or for any other purpose. Also, to lease all or any such lands as shall be of freehold tenure, or sublet such as shall be of leasehold tenure for any term for which I could myself lease or sublet the same not exceeding twenty-one years in possession, at such rent, or for such other valuable consideration as my said^c

^a If more than one is intended, add after names and additions "jointly and each of them severally my attorneys and"

^b Add "leases," "mortgages," or otherwise, if in accordance with the fact.

^c Insert "attorneys or" if more than one.

And for me and in my name or otherwise to sign all such transfers and other instruments and do all such acts matters and things as may be necessary or expedient for carrying out the powers hereby given, and for recovering all sums of money that are now or may become due or owing to me in respect of the premises, and for enforcing or varying my contracts, covenants, or conditions binding upon any purchaser, lessee, tenant, or occupier of the said lands, or upon any other person in respect of the same, and for recovering and maintaining possession of the said lands, and for protecting the same from waste, damage, or trespass.

Signed in my presence by the said
who is personally known to me:

(Shortly describe each property or interest, with reference to the volume and folio of registration.)

Appeared before me, at _____, the _____ day of _____ one thousand eight hundred and _____, the attesting witness to this instrument, and declared that he personally knew _____ the person signing the same and whose signature thereto he has attested; and that the name purporting to be such signature of the said _____ is his own handwriting, and that he was of sound mind, and freely and voluntarily signed the same.

Power of Attorney from

do hereby certify that the within Power of Attorney is correct for the purposes of the Real Property Act.

Particulars entered in the Register
Book, Vol. Folio , the
day of - 186 .

Registrar General.

* If this instrument be signed or acknowledged before the Registrar General or Deputy Registrar General, or a Notary Public, a J.P., or Commissioner for Affidavits, to whom the Transferor is known, no further authentication is required. Otherwise the ATTESTING WITNESSES must appear before one of the above functionaries to make a declaration in the annexed form. This applies to instruments signed within the Colony. As to those signed elsewhere, the execution or declaration as the case may be must be as follows:—If in Great Britain or Ireland, before the Mayor or Chief Officer of a Corporation, or before a Notary Public; if in a British Possession, before the Registrar General or Recorder of the Town; if in a Foreign Possession, before the British Consul or the Governor, Government Resident, or Chief Secretary; if in a foreign place, then before the British Consular Officer. If the Transferor signs by a mark, the attestation must state "that the instrument was read over or explained to him, and that he appeared fully to understand the same."

May be made before either Registrar General, Deputy Registrar General, a Notary, J.P., or other authorized functionary, enumerated in foregoing note. Not required if the instrument itself be made or acknowledged before one of these parties.

(A distinct form is supplied for Specific Property.)

New South Wales.

(26 Victoria, No. 9.)

I, _____ do hereby appoint _____ attorney to sell to any person all or any lands, leases, mortgages, or other encumbrances or registered estates or interests in land, whether now belonging to me, or which shall hereafter belong to me, under or by virtue of the Real Property Act, or of which I am now or shall hereafter be the registered owner under the said Act. Also, to mortgage or otherwise encumber the same respectively, for securing any sum at any rate of interest or for any other purpose.

* If more than one is intended, add after names and additions, "jointly and each of them severally my attorneys and"

REAL PROPERTY (FORMS).

Also, to lease all or any such lands as shall be of freehold tenure, or sublet such as shall be of leasehold tenure for any term for which I could myself lease or sublet the same, not exceeding twenty-one years in possession, at such rent, or for such other valuable consideration as my said ^b attorney shall deem fit.^c

And for me and in my name or otherwise to sign all such transfers and other instruments, and do all such acts, matters, and things as may be necessary or expedient for carrying out the powers hereby given, and for recovering all sums of money that are now or may become due or owing to me in respect of the premises, and for enforcing or varying my contracts, covenants, or conditions binding upon any purchaser, lessee, tenant, or occupier of the said lands, or upon any other person in respect of the same, and for recovering and maintaining possession of the said lands, and for protecting the same from waste, damage, or trespass.

In witness whereof, I have hereunto subscribed my name, this _____ day of _____ 186 .

Signed in my presence by the said
who is personally known to me^d }

FORM OF DECLARATION BY ATTESTING WITNESS.*

Appeared before me, at _____, the _____ day of _____, one thousand eight hundred and _____, the attesting witness to this instrument, and declared that he personally knew _____ the person signing the same, and whose signature thereto he has attested; and that the name purporting to be such signature of the said _____ is his own handwriting, and that he was of sound mind, and freely and voluntarily signed the same.

No.

Power of Attorney from

to

I, the within-mentioned and under-signed,
do hereby certify that the within Power of Attorney is correct for the purposes of the Real Property Act.

Particulars entered in the Register
Book, Vol. _____ Folio _____, the
day of _____ 186 .

Registrar General.

^b Insert "attorneys or" if more than one.

^c Here insert anything required in addition or modification.

^d If this instrument be signed or acknowledged before the Registrar General or Deputy Registrar General, or a Notary Public, a J.P., or Commissioner for Affidavits, to whom the Transferrer is known, no further authentication is required. Otherwise the attesting witness must appear before one of the above functionaries to make a declaration in the annexed form. This applies to instruments signed within the Colony. As to those signed elsewhere, the execution or declaration as the case may be, must be as follows.—If in Great Britain or Ireland, before the Mayor or Chief Officer of a Corporation, or before a Notary Public; if in a British possession, before the Registrar General, or Recorder of Titles of such possessor, or before any Judge or Notary Public, or before the Governor, Government Resident or Chief Secretary; if in a foreign place, then before the British Consular Officer. If the Transferrer signs by a mark, the attestation must state "that the instrument was read over or explained to him, and that he appeared fully to understand the same."

* May be made before either Registrar General, Deputy Registrar General, a Notary, J.P., or other authorized functionary, enumerated in preceding note. Not required if the instrument itself be made or acknowledged before one of these parties.

K

New South Wales.

REGISTRATION ABSTRACT.

(26 Victoria, No. 9.)

PURSUANT to Act of the Legislature of the said Colony, intituled "The Real Property Act," sections 70 and 71, this Registration Abstract is issued for the purpose of enabling the Registered Proprietor to deal with the above described land at places without the limits of the said Colony, and shall continue in force from the date hereof until the
day of _____ or until the same be surrendered to me for
cancellation.

In witness whereof, I have hereunto signed my name and affixed my seal, this _____ day of _____

Registrar General.

Signed and sealed, the _____ day of _____ in the presence of

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[Endorsement.]

No.

REGISTRATION ABSTRACT.

Particulars entered in the Register Book, Vol. Folio , the
day of 18 , the
Registrar General.

L

New South Wales.

REVOCATION ORDER.

(26 Victoria, No. 9.)

I, of being seized of an Estate in all
hereby revoke the Power of Attorney given by me to
dated the day of .

In witness whereof, I have hereunto subscribed my name, this day of
in the presence of

No.

Revocation Order.

I, the within-mentioned and under-
signed
do hereby certify that the within Revoca-
tion Order is correct for the purposes of
the Real Property Act.

Particulars entered in the Register
Book, Vol. Folio , the
day of 18 .

Registrar General.

Declaration for the purpose of Negating Dower.

I^a of^b do hereby solemnly and sincerely declare as follows:—

AND I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the ninth year of the reign of Her present Majesty, intituled "An Act for the more effectual abolition of Oaths and Affirmations taken and made in various departments of the Government of New South Wales, and to substitute Declarations in lieu thereof, and for the suppression of voluntary and extra-judicial Oaths and Affidavits."

Subscribed and declared at this }
day of 18 ,^d before me,^c }

Signature of Declarant.

^a Christian and surname at full length.

^b Residence and occupation.

^c State the facts. If the date of a marriage be the fact declared to, the precise day, month, and year should, if possible, be set forth; also, the place at which, and the name of the clergyman by whom the ceremony was performed; and the wife's maiden name.

^d If Declarant cannot write, add, "And I hereby certify, that the contents had been previously read over to the Declarant, who appeared perfectly to understand the same."

^e J.P., Notary, or Commissioner for Affidavits.

Annexure to Application No. for the purpose of Barring Dower.

THESE presents witness, That in order to give further effect to the annexed application^a
and^b his wife, hereby release, convey, and assure the land
therein mentioned unto and to the use of of his heirs and
assigns for ever. In witness whereof, the parties to these presents have hereunto set
their hands and seals, this day of A.D. 18 .

Signed, sealed, and delivered by the said }
and }
in the presence of— }

^dL.S.

^dL.S.

^a Name of applicant.

^b Name of wife.

^c Name, residence, and occupation of nominee.

^d Affix seal.

REAL PROPERTY (FORMS).

THIS is to certify, that _____ wife of the abovenamed _____ came before me,^a of _____ [a Commissioner of the Supreme Court of New South Wales for taking Affidavits, not residing within ten miles of Sydney, and not being the person employed to prepare the within deed, and not being a party thereto,] and she being by me examined, apart from her said husband, acknowledged that the written instrument [the application therein referred to being annexed thereto, and considered as part thereof] was executed by her, and that she was acquainted with and understood the nature and effect thereof; and she declared that she has so executed the same freely and voluntarily, and without menace, force, or coercion, either on the part of her husband or of any other person.

Witness my hand, at _____ the _____ day _____ 18 ____
[SEAL.]

^a [NOTE.—This acknowledgment must be made before the Registrar General or his Deputy, if executed in Sydney or within ten miles thereof; if beyond that distance, then before any Commissioner for taking Affidavits, not within the exceptions stated in the Form of Certificate.]

Annexure to Memorandum of^a
By^b _____ of^c _____ of^d _____ of land, being
of the land comprised in^e _____ dated _____ registered volume
folio _____
Know all men, that I^f _____ the wife of _____ the transferror (or mort-
gagor) named in the above mentioned and annexed memorandum, do hereby, for the
considerations therein mentioned, and in order to give further effect thereto, release unto
the transferee (or mortgagee) therein also named, all my contingent right
of dower or other claim or interest in or to the land therein and above mentioned or
referred to.
As witness my hand, the _____ day of _____ A.D. one thousand eight
hundred and _____ }
Signed, sealed, and delivered in _____ } [SEAL.]
the presence of—

THIS is to certify, that _____ wife of the abovenamed _____ came before me,^a [a Commissioner of the Supreme Court of New South Wales for taking Affidavits, not residing within ten miles of Sydney, and not being the person employed to prepare the within deed, and not being a party thereto,] and she being by me examined, apart from her said husband, acknowledged that the within written instrument was executed by her, and that she was acquainted with and understood the nature and effect thereof; and she declared that she has so executed the same freely and voluntarily, and without menace, force, or coercion, either on the part of her husband or of any other person.

Witness my hand at _____ the _____ day _____ 187 ____
[SEAL.]

- ^a Transfer or mortgage, as the case may be.
- ^b Name of transferror (or mortgagor).
- ^c Name of transferee (or mortgagee).
- ^d State quantity, and fill up references, as in annexed instrument.
- ^e Certificate of title, or Crown grant, as the case may be.
- ^f Name of wife.

^s [NOTE.—This acknowledgment must be made before the Registrar General or his deputy, if executed in Sydney or within ten miles thereof; if beyond that distance, then before any Commissioner for taking Affidavits, not within the exceptions stated in the form of certificate.]

Certificate No. _____ Vol. _____ No. _____

NEW SOUTH WALES.

Caveat forbidding Registration of dealing with Estate or Interest.

(26 Victoria, No. 9.)

(~~26~~ Another form of Caveat, forbidding lands to be brought under the Real Property Act, may be obtained.)

TAKE NOTICE, that I,^a _____ of^b _____ claiming Estate or Interest^c
in lands described as^d _____ forbid the registration of any memo-

- ^a Name of caveator in full.
- ^b Address and description in full.
- ^c Here state the nature of the estate or interest claimed, and the facts on which the claim is founded.
- ^d Here state particulars of description from certificate. A reference to the area, parish, city, or county, with No. and vol. will suffice.

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random of transfer or instrument affecting the said land until this caveat be by me or by order of the Supreme Court or some Judge thereof withdrawn, or until after the lapse of fourteen days from the date of the service of notice of such intended registration at the following address :—

Dated this day of 18 .
Signed in my presence, this } Signature of Caveator or his Attorney.
day of 18 ,—

To the Registrar General of the
Colony of New South Wales.

N.B.—Section 104 requires that the following certificate be signed by caveator or his solicitor, and renders liable any person falsely or negligently certifying, to a penalty of £50; also, to damages recoverable by parties injured.

I certify that the within caveat is correct for the purposes of the Real Property Act.^s

^s See indorsement.

^r State distinctly, an address in Sydney at which notices relating hereto may be served.

^s If by a solicitor insert—“And that I am the solicitor of the within-named caveator, and add his own address to his signature.”

FEEs.

For noting Caveat ... 10s.
For withdrawing or cancelling Caveat ... 5s.

The following information is afforded for guidance of parties in the interior :—

No caveat can be filed or withdrawn until the fees are paid.

A caveat may be withdrawn at any time by a caveator. (See sec. 81.)

Section 82 directs the Registrar General to notify the receipt of any caveat to the registered proprietor affected thereby, who will be entitled to summon the caveator before the Supreme Court or a Judge, to show cause why it should not be removed.

The same section provides, that, except in the case of caveats by settlers, or by or on behalf of beneficiaries under will or settlement (or for specified causes by the Registrar General), caveats against a registered proprietor shall lapse on 14 days after notice to the caveator of an intended alienation, unless order made to the contrary by the Supreme Court or Judge. If the caveat be among the excepted cases, the reference to lapse on notice may be omitted, but an address, at which all proceedings relating to the caveat may be served, must be always inserted.

Section 84 provides, that any person lodging any caveat with the Registrar General without reasonable cause, shall be liable to make to any person who may have sustained damage thereby, such compensation as may be just; and such compensation shall be recoverable in an action at law by the person who has sustained damage from the person who lodged the caveat.

This form of caveat may sometimes be conveniently employed by way of equitable mortgage. If the certificate be deposited with this intent, a formal mortgage should be executed and retained with the certificate, the interest of the Mortgagee being then protected by a caveat. No formal mortgage should be held unregistered without lodging a Caveat.

This caveat may also be rendered available pending unfulfilled contracts, or in cases of insolvency, to preclude dealings in prejudice of purchasers, creditors, or others.

SPECIAL NOTICE OF APPLICATION.

Land Titles Office,
Sydney, 187 .

Mr. Your attention is called to the accompanying notification of claim of and tracing of land in respect of which he applies for Certificate of Title, in order that you may lodge caveat within the time limited, if you have any opposing claim to allege; as otherwise such claim will be finally excluded.

The leading provisions of the Real Property Act, in reference to caveat, are noted below for your information, and a printed form may be obtained at this Office, if required.

I have the honor to be,

Your obedient Servant,

REAL PROPERTY ACT AMENDMENT ACT.

PROVISIONS OF REAL PROPERTY ACT REGARDING CAVEAT.

1. The lodging of caveat suspends all further action until caveat be withdrawn or lapse, or until decision obtained from Supreme Court. (Sec. 22.)
2. Every caveat lapses at the expiration of three months from receipt, unless caveator within that time have taken proceedings in some Court of competent jurisdiction to establish his title, and shall have given written notice thereof to Registrar General, or shall have obtained from Supreme Court order or injunction restraining Registrar General from bringing the land under the Act. (Sec. 23.)
3. Caveat may be withdrawn at any time by the caveator. (Sec. 81.)
4. Any person lodging caveat without reasonable cause, is liable to make to any person who may have sustained damage thereby, such compensation as may be just; which is recoverable in action at law. (Sec. 84.)
5. By omission to lodge, or allowing lapse of caveat after notice or with knowledge of application, claim on assurance fund is forfeited. (Sec. 122.)

36 Vic. No. 7. An Act to amend the Real Property Act of 1862.
[21st February, 1873.]

Preamble.

WHEREAS it is expedient to amend the Real Property Act of 1862 in manner herein-after provided, Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same as follows:—

Transfer by endorsement on certificate.

1. Upon the registration of any memorandum of transfer, in the form marked D in the Schedule to the "Real Property Act of 1862," comprising the whole of the land described in any grant or certificate of title, it shall not be necessary for the transferee to take out a certificate of title in his own name, but he may receive the grant or certificate of title of the transferor, or, in the case of a sale by a mortgagee, the grant or certificate of title of the mortgagor, with a memorial of the transfer in each case indorsed thereon; and the Registrar General shall not, after registering any such transfer, enter a memorandum cancelling such grant or certificate of title, as required by the "Real Property Act of 1862," and each successive transferee (if any) of the whole of such land may, at his option, take out a certificate of title in his own name, or may receive the same grant or certificate of title upon which the memorial or memorials of any previous transfer or transfers have been endorsed as aforesaid; but the Registrar General, whenever in his opinion any grant or certificate of title shall be incapable of containing with convenience any further endorsements, may compel the last transferee to receive a certificate of title in his own name.

Transfer need not be in duplicate. Crown grant in name of deceased person.

2. A transferee of land shall not be required in any case to present in duplicate a memorandum of transfer for the purpose of registration.

3. The effect given by section twenty-six of the Real Property Act of 1862, to a certificate of title issued in the name of a deceased person, shall extend to every Crown grant in the name of a deceased person who would have been entitled thereto if living.

Charges for long certificates, &c.

4. In addition to the charges and fees provided by the "Real Property Act of 1862," the Registrar General may charge for any certificate of title which shall exceed in length six folios of seventy-two words each, a further sum of two shillings for each folio or part of a folio in excess of such six folios, and if there shall be more than one diagram in such certificate, a further sum of one shilling for every such diagram after the first diagram.

Plans to be in duplicate.

5. All plans hereafter to be prepared and required to be deposited for the purposes of the "Real Property Act of 1862" shall, if required by the Registrar General, be in duplicate.

Act incorporated with Act of 1862.

6. This Act shall be construed together with the "Real Property Act of 1862," and except so far as any portion of the said "Real Property Act of 1862" may be repealed or altered or added to by this Act, the provisions of the said "Real Property Act of 1862" shall remain in full force.

Short title.

7. This Act may be cited for all purposes as the "Real Property Act Amendment Act of 1873."

REGISTRATION (DEEDS).

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REGISTRATION OF BIRTHS, &c.

19 Vic. No. 34. An Act for registering Births, Deaths, and Marriages.

[3rd December, 1855.]

19. Certified copies of registers or of entries of registers made or given by the Registrar General or any Deputy Registrar, and purporting to be signed by such officers respectively, shall be received as *prima facie* evidence in any Court of Justice within the said Colony, of the fact of the birth, death, or marriage, to which the same relates: Provided that no entry of the register of any death shall be received as evidence of the fact of such death, unless there shall also be an entry of the register of the burial.

Certified copies of registers signed by the Registrar General, or any Deputy Registrar, shall be received as *prima facie* evidence.

REGISTRATION OF DEEDS, &c.

7 Vic. No. 16. An Act to consolidate and amend the Laws relating to the Registration of Deeds and other Instruments in that part of the Colony of New South Wales not comprehending the District of Port Phillip. [20th December, 1843.] (*)

1. [Preamble and Repeal of Acts.]

2. And be it enacted, That this Act shall commence and take effect on and from the first day of January, one thousand eight hundred and forty-four.

Commencement of Act.

3. And be it enacted, That a public office to be called the office of the Registrar General shall be established and kept in the City of Sydney for the registration of wills and devises, deeds, conveyances, and other assurances affecting real property, situate within that part of the Colony of New South Wales not comprehended within the limits of the district of Port Phillip, and for the registration of the Acts of the Colonial Legislature, charters of incorporation, memorials of public companies, and other instruments in writing, of and relating to property situate within the said Colony, and for the registration of certain marriages, births, baptisms, and burials which may occur or take place within the said part of the said Colony; and the said office shall be kept open for the transaction of the business thereof for not less than six hours, beginning at the hour of ten in the forenoon on all days throughout the year, Sunday, Christmas Day, and Good Friday excepted.

Office for the registration of deeds, &c., to be established at Sydney.

4, 5. [Appointment of Registrar General—Oath by him.]

6. And be it enacted, That in the event of the said Registrar General being unable from sickness or otherwise to attend and perform the duties of his said office, or in the event of the said Registrar General being absent from Sydney upon necessary business, such absence being with the permission of the Governor of the said Colony for the time being, it shall be lawful for the Registrar General, with the approval of the said Governor as aforesaid, to appoint some fit and proper person to act in his stead, and to sign in his name all such memorials or other papers as require his signature, and to do and perform all and every such other acts and deeds as appertain to and constitute the duties of such Registrar General: Provided, nevertheless, that the said Registrar General and his sureties shall be liable and answerable for the laches, neglect, or misconduct of such deputy, in the same manner as such Registrar General and his sureties would be liable in case such acts or laches or misconduct had been done or suffered by the Registrar General himself.

Registrar General in case of sickness or absence to appoint, with the approbation of the Governor, a person to perform the duties. Provide that Registrar General shall be answerable for laches.

7. And be it enacted, That as soon as conveniently may be after this Act shall have come into operation, the Registrar of the Supreme Court and the Registrar General appointed under this Act shall (under direction of the Judges or one of them) make an inventory in duplicate of all Crown grants and enrolments thereof, and of all deeds, conveyances, and other instruments in writing affecting any lands or hereditaments in this Colony, and memorials and registrations thereof respectively, and matters relating thereto, and all Acts of the Governor and Legislative Council which are required by statutes passed in the fourth and ninth years respectively of the reign of His late Majesty King George the Fourth, to be enrolled in the Supreme Court of the said Colony, and were for that purpose deposited in the office of the Registrar of the Supreme Court, and of all charters of incorporation, co-partnership deeds, memorials of public companies, and certificates and registers of births or baptisms, marriages and burials, and of all other instruments of what nature soever, at any time required by any law in force in this Colony to be registered, recorded, or deposited in the office of the said Registrar, and which shall then remain or be therein and shall not relate exclusively to the business of the Supreme Court, or any suit or proceeding in such Court in which said inventory shall be specified, particularly the years or volumes or numbers of each class of the said several instruments or documents respectively, and whether the same appear to be complete or defective; and after the making of such inventory (of which each duplicate shall be signed by one

Transfer of records, &c., from office of Registrar of Supreme Court to the office of the Registrar General.

(*) See Appendix for the most important provisions of the old Registration Acts, which may still, although repealed, have an important bearing upon the questions raised by registrations, &c., before 1st January, 1844.

REGISTRATION (DEEDS).

of the said parties and delivered to and kept by the other of them), the said Registrar shall on the application at his office of the said Registrar General, deliver (on a day to be appointed by the said Judges or one of them as soon as possible thereafter), all and singular the records, instruments, and matters aforesaid, together with all books and indexes relating thereto, to the said Registrar General, who shall thereupon sign upon the duplicate of inventory retained by the Registrar of the Supreme Court an acknowledgment of the receipt of the said several instruments, documents, and matters, and such acknowledgment and inventory shall remain thereafter in the office of the said Registrar, and shall be a full and complete acquittance to him in respect to the charge of the same respectively; and the said Registrar General shall thereupon and thenceforth have the custody and charge thereof, and shall deposit and retain the same in his office accordingly; and the same records, memorials, instruments, and matters shall continue to have the same force and effect respectively to all intents as they respectively would have had if they had remained in the Registrar's Office of the Supreme Court and this Act had not been passed.

Subsequent
registration in
Registrar
General's Office.

8. And be it enacted, That from the day on which this Act shall commence, all grants by Her Majesty and Her Successors of lands or other hereditaments in this Colony made or to be made under the Great Seal of the Colony, and which shall not have been then already enrolled in the Supreme Court, shall be recorded by entry at full length in the office of the Registrar General in some book or books there kept for that purpose, and being so recorded shall for all purposes be of like force and effect as if the same had been duly enrolled and entered of record in the said Supreme Court, and also all wills hereafter to be made affecting any lands or hereditaments in this Colony (not within the District of Port Phillip), or so much of any such will as shall relate thereto, shall or may be registered in the office of the said Registrar General by the devisee or other party claiming title to or any other right or interest to or in such lands or hereditaments under such will in the same manner and form as by this Act is directed with respect to the registration of deeds; and all deeds, conveyances, agreements, and other instruments affecting any lands or hereditaments in New South Wales (not within the said district), and all certificates and registers of births or baptisms, marriages and burials, and all agreements or mortgages respecting any lien on wool or charge on or interest in sheep or other cattle, and all charters of incorporation, deeds of co-partnership, memorials of companies, and other instruments in writing which said several deeds, instruments, documents, or matters, or any of them, at the time of the passing of this Act were or are required by any law in force within this Colony to be enrolled, recorded, registered, or deposited respectively by or with the Registrar of the Supreme Court or in his office (and which at the time of the commencement of this Act shall not have been so enrolled, recorded, registered, or deposited), shall instead thereof be enrolled, recorded, registered, or deposited (as the case may require) by or in the office of the said Registrar General; and such last-mentioned enrolment, recording, registration, or deposit shall have in all respects the same effect respectively to all intents and purposes as if the same had been performed by or had taken place in the office of the Registrar of the said Supreme Court, and this Act had not been passed.

Acts of Council
to be enrolled in
the office of
Registrar
General.

9. And be it enacted, That all Acts passed by the Governor of New South Wales with the advice and consent of the Legislative Council thereof, during the present Session of the said Council, shall be transmitted to and enrolled and recorded in the office of the Registrar General at Sydney, and all Acts to be at any time hereafter passed by the said Governor and Council shall within ten days from the day on which the same shall become law be transmitted, enrolled, and recorded in like manner.

Wills, deeds,
conveyances,
&c., to be regis-
tered in the office
of the Registrar
General.

10. And be it enacted, That from and after the day on which this Act shall commence and take effect, all wills and devises affecting real estates made or to be made and published, or full copies of such wills certified by the oath of one credible person taken before a Judge of the Supreme Court of New South Wales, or before the Registrar General, or his deputy, or before any Commissioner appointed by the said Court for taking Affidavits, and not residing within ten miles of Sydney, and all agreements in writing giving a preferable lien on wool, and memorials of mortgages of sheep, cattle, or horses, made and executed under an Act of Council passed in the present Session of the Legislative Council of this Colony, intituled "*An Act to give a preferable Lien on Wool from season to season, and to make Mortgages of Sheep, Cattle, and Horses, valid without delivery to the Mortgagee,*" and all charters of incorporation, memorials of public companies, and other instruments in writing of and relating to the property situate within the said part of the said Colony which may require registration, and all certificates and registers of certain marriages, births, baptisms, and burials which may occur or take place within the said part of the said Colony, which either by law or practice have heretofore been enrolled or registered in the office of the Registrar of the Supreme Court, shall or may after the passing of this Act be enrolled or registered in the office of the Registrar General.

11. And be it enacted, That all deeds and other instruments (wills excepted) affecting any lands or hereditaments or any other property in the said part of the Colony of New South Wales, which shall be executed, or made *bond fide*, or for valuable consideration, and which shall be duly registered under the provisions of this Act, shall have and take priority not according to their respective dates, but according to the priority* of the registration thereof only. ⁽³³⁾

12. And be it enacted, That when any party to any instrument required to be registered shall be dead or absent from the Colony at the time when the registration thereof shall be required to be made, it shall and may be competent for the lawful representative or attorney of such party, upon application to one of the Judges of the Supreme Court at Sydney, and upon proof, to the satisfaction of such Judge, of the fact of the death or absence of such party, and upon the order of such Judge, to sign the attested copy or memorial of such instrument in the name and on the behalf of the party to such instrument, and such signing shall be as valid and effectual to all intents and purposes as if such attested copy or memorial had been signed by the original party or parties thereto.

13. And whereas, from the imperfect manner in which the limitations contained in deeds and conveyances relating to real estates are generally set forth and described in the memorials or extracts of the same as heretofore filed, it is expedient that full copies, written upon vellum or parchment, of all deeds, conveyances, and other assurances affecting real estates should be registered and filed in the office of the Registrar General instead of the memorials or extracts heretofore required: Be it therefore enacted That from and after the day on which this Act shall commence and take effect an examined copy at full length signed by some or one of the parties to the original deed or instrument, and certified by the oath of one credible person, such oath having been taken before a Judge or before the Registrar General or his deputy, or before any Commissioner appointed by the said Court for taking Affidavits, and not residing within ten miles of Sydney, of every deed, conveyance, and other instrument affecting or relating to real estates situate within that part of the Colony of New South Wales not comprehended within the limits of the District of Port Phillip, shall be filed in the office of the Registrar General of the said Colony at Sydney, in lieu of the memorial or extract heretofore filed, and every such certified copy as aforesaid and also every certified copy of any such will as aforesaid, shall or lawfully may be received and given as secondary evidence in any suit or proceeding.

14. And be it enacted That upon the delivery into the Registrar General's Office of any such certified copy or memorial as aforesaid, and the verification of the same, the Registrar General or his deputy shall grant and sign a receipt for such copy or memorial in which shall be specified the certain day and hour on which the same shall have been delivered into the said office, and the name and place of abode of the witnesses or witness attesting or verifying the same, and the number of such verified copy or memorial according as the same shall be numbered in the said office; and such receipt shall be endorsed or written on the original instrument to which such certified copy or memorial shall relate, and shall also be entered on such certified copy or memorial, and the time so endorsed shall be held, deemed, and taken to be the time of the registration of every such deed, conveyance, or other instrument in writing whereof

(*) See section 18 of the Titles to Land Act, 1858, *post*, p. 158.

⁽³³⁾ The non-registration of a deed makes it void against a subsequent purchaser for value claiming under a duly registered deed, whether such last deed were executed by the transferrer or his assignee. *Fuller v. Goodwin*, 4, S.C.R., 66.

A, having mortgaged his estate to B, purchased from C, the Assignee of his insolvent estate, all his assets, including the equity of redemption, for a nominal consideration, but did not register his conveyance. Subsequently, B, without notice, and for a nominal consideration, purchased the same equity of redemption from C, and registered. *Held* that under 7 Vic. No. 16, B's title had priority, no *mala fides* having been shown in C. *Campbell v. Josephson*, 1, S.C.R., Eq. 35.

The Colonial Registration Act, 5 Vic. No. 21, section 11—[Although this Act has been repealed, the wording of the section corresponds with section 11 of the Act now in force, 7 Vic. No. 16.—Ed.]—enacts that all deeds, and other instruments affecting any lands or hereditaments in New South Wales, duly registered, shall have priority according to the date of registration in relation to the property. The surviving executor under the will executed for a nominal consideration a conveyance of the land, in confirmation of the previous execution sale made by the Sheriff under a *fleri facias*. Such deed was held under the circumstances not to be, in the purview of that Act, a deed for valuable consideration, so as to give by registration priority over a previous purchaser whose deed was not registered. *Bullen and another v. A'Beckett and others*, 1, Moore's P.C. Reports, N.S., p. 224. On the question of registration *pendente lite*, see *Blackwood v. London Chartered Bank of Australia*, 5, L.R., P.C.A., p. 92, and 9, S.C.R., 32-101.

Deeds to take effect according to priority of registration.

Representative of party if dead, or agent of an absent party may sign memorial in his name.

Full copies upon parchment of all deeds, &c., affecting real estate to be certified on oath and filed in the office of Registrar General instead of memorial as heretofore.

Receipts to be granted by Registrar General.

such certified copy or memorial shall have been made as aforesaid; and every such certified copy or memorial so delivered into the said office shall be numbered successively according to the order of time in which the same shall have been delivered, and shall immediately be registered according to such number and order of time in a book or books to be provided and kept for such purpose in the said office, and every such book shall be open at all convenient times to the inspection of all such persons as may be desirous of searching the same.

Size of parchment for certified copies of deeds and memorials.

(*See in Act.)

15. And be it enacted, That from and after the day on which this Act shall commence and take effect, every such certified copy as aforesaid of any deed, conveyance, or other instrument affecting real estates and also every such memorial of any mortgage on sheep, cattle, or horses, which shall be required to be registered in the office of the said Registrar General, shall be written or printed, or partly written and partly printed, upon good vellum or parchment of the size of eighteen inches in length by twelve inches in breadth, having an entirely clear margin or border without writing or printing on either side, of the breadth of two inches along the whole length of every such certified copy as aforesaid of any deed, conveyance, or other instrument, and of every such memorial as aforesaid, and no such certified copy or memorial as aforesaid, written or printed otherwise than in accordance with the preceding directions, or having therein any erasures or interlineations, shall, from and after the day on which this Act shall commence and take effect, be received by the said Registrar General into his office, unless such erasure or interlineation shall be noticed in the margin opposite thereto, by the signature or initials of the person certifying on oath to the truth and correctness of such copy or memorial.

Recital of Proclamation of the Governor, dated 6th March, 1819, as to barring right of married women to dower.

16. And whereas fines with proclamations could not be conveniently levied nor common recoveries suffered in this Colony, and whereas by a certain Proclamation of the Governor of New South Wales bearing date the sixth day of March in the year of our Lord one thousand eight hundred and nineteen, certain regulations were made for barring the right and title of married women to dower, and other her estates of freehold, and whereas it is expedient that the said proclamation, so far as respects the alienation of any such right and title *bona fide* made in conformity therewith, should be confirmed, and that the want of fines and recoveries should be effectually supplied by making other conveyances attended with the particular forms hereinafter mentioned equivalent thereto: Be it therefore enacted, That every deed, conveyance, or other instrument in writing, made and executed by any married woman, of and concerning

Every deed, &c., executed by any married woman under said proclamation to be held valid.

any lands, tenements, or hereditaments situated in New South Wales, and acknowledged in the form and manner appointed and directed by the said proclamation, shall be and be taken to be valid and effectual to pass and convey all the right, title, and interest of such married woman to and in all such lands, tenements, or hereditaments intended to be alienated and conveyed by such deed or other instrument; and further, that any deed or deeds in due form of law made and executed by any party or parties from whom any estate, right, title, or interest in any lands, tenements, or hereditaments situated in New South Wales, is or may be intended to be passed and acknowledged by such party or parties in the manner hereinafter mentioned, that is to say, if such deed or deeds shall be made and executed in New South Wales, and shall be acknowledged before one of the Judges of the Supreme Court of New South Wales, or before the Registrar General appointed under this Act, or his deputy, or before any Commissioner of the Supreme Court appointed under this Act, such Commissioner not being a party to such instrument nor having been employed to prepare the same, or if made and executed in Van Diemen's Land, or in New Zealand, or in South Australia, or in Western Australia, or in the District of Port Phillip, shall be acknowledged before a Judge of such Colony or District respectively, or if made and executed in Great Britain or Ireland, shall be acknowledged before any Mayor or other Chief Magistrate of the city, borough, or town corporate where or near to which the person or persons making such acknowledgment shall reside, such deed or deeds so acknowledged shall be as valid and effectual in the law to pass all the estate, right, title, interest and claim of the respective parties to such deed or deeds in or to all and every such lands, tenements, or hereditaments as aforesaid in such deed or deeds mentioned and intended to be conveyed, and to transfer and convey the same to the grantee or grantees, bargainee or bargainees or other person or persons in such deed or deeds mentioned, their heirs and assigns for ever, according to the several estates and interests in and by such deed or deeds conveyed and limited, as if a fine or fines with proclamations had been levied, or a common recovery or recoveries had been suffered of such lands, tenements, or hereditaments, or as if such lands, tenements, or hereditaments intended to be conveyed had been conveyed by the firmest and most regular deeds, conveyances, and instruments: Provided always that in case any married woman may be a party to any such deed or deeds as last aforesaid such married woman shall be at the time of the execution thereof of the full age of twenty-one years, and shall be examined privately and apart from her husband by the Judge or other person before whom such acknowledgment shall be made as aforesaid, and confess that she did execute the same freely, voluntarily, and without the fear,

Deeds made and executed in due form of law acknowledged before a Judge of the Supreme Court of N. S. Wales, or Van Diemen's Land, &c., or if made in Great Britain, or Ireland, before a Mayor or other Chief Magistrate, shall be valid.

Course to be pursued as to married women who may be parties to such deeds.

menace, or coercion of her husband : Provided also that every such acknowledgment and confession as aforesaid shall be certified under the common seal of such city, borough, or town corporate, or seal of office of the Judge or other person before whom the same shall be made as aforesaid, and such certificate shall be endorsed or affixed to such deed or deeds as last aforesaid, and shall be in the form, or to the effect of the form set forth in the Schedule to this Act annexed marked A, and shall be deemed and taken as sufficient proof of every such acknowledgment or confession as aforesaid.

17. And be it enacted, That it shall be lawful for the Judges of the Supreme Court of New South Wales, or any of them, by a commission under his or their hand and seal, to authorize and empower certain fit and proper persons to take and receive the acknowledgment of such party or parties as aforesaid, or the confession of any married woman as to her voluntary execution thereof in manner aforesaid, and the same shall be certified under the hand and seal of such person and endorsed or written upon or affixed to such deed or deeds as hereinbefore directed, and shall be of like force and effect as if such acknowledgment or confession had been made before any Judge of the said Court.

Judges may appoint persons to receive acknowledgments.

18. And be it enacted, That the original instrument to which any such acknowledgment or certified copy or memorial as aforesaid relates shall be produced to the Judge or Registrar General or other person before whom the same shall be made or verified as aforesaid, and in case such instrument shall appear to have been executed by any party unable to write, then such Judge, or Registrar General, or other person, shall refuse to complete such acknowledgment, or certified copy, or memorial, by certifying the same, unless the execution by such party shall be attested by some Justice of the Peace, or barrister, or attorney, or notary public, other than the party by whom such instrument shall have been prepared, whose attestation shall contain a certificate that the contents of such instrument were previously explained to the party so unable to write, and that the nature and effect thereof were at the time of such attestation to the best of the belief of such Justice, or barrister, or attorney, or notary public, understood by such party.

Original instrument to be produced. Course to be taken if any marksman thereto.

19. And be it enacted, That there shall be paid in respect of the several matters mentioned in this Act, and in the Schedule hereunto annexed marked B, and also for and upon the enrolment of every grant of the Crown hereafter made and issued, the sums or fees respectively set forth in the said Schedule, which respective sums or fees shall be demanded and taken by the Registrar General at Sydney or by his deputy, or other person who may be appointed to discharge the duties of Registrar, upon receipt by him of any such certified copy as aforesaid, or memorial, or grant from the Crown, for the purpose of registration, or enrolment, as the case may be ; and a true and regular account of all such fees shall be kept in the said Registrar General's Office, and shall be accounted for and paid over by the Registrar General to the Public Treasury : Provided always that the sums or fees hereby made payable on the enrolment of any grant from the Crown shall not be paid to such Registrar General, Deputy Registrar, or other person as aforesaid, but to the Colonial Treasurer in Sydney or to such other officer as may be appointed by His Excellency the Governor to deliver such grant, upon the delivery of the same to such grantee or to his representatives or assigns ; and all such fees or sums so paid shall be accounted for and applied in the same manner as other public moneys coming into the hands of the said Colonial Treasurer are required to be accounted for and applied.

Fees to be paid on registration.

20. And be it enacted, That in addition to the fees made payable by the said Schedule marked B, it shall be lawful for every Commissioner appointed under this Act, except at Sydney, to demand and have for his own use for the taking and certifying by him as aforesaid of every such acknowledgment under this Act the sum of five shillings, and for the taking of every such verification of any such certified copy or memorial as aforesaid the sum of two shillings and sixpence.

Fees to Commissioner.

21. And be it enacted and declared, That no judgment in any action at law recovered or to be recovered shall bind or affect, or be deemed to have bound or affected, any lands or hereditaments in the said Colony : Provided always that every writ of execution or any such judgment against the lands or hereditaments of the person against whom such judgment shall be obtained, when delivered to the Sheriff of the said Colony, or to the Sheriff of any district thereof, as the case may be, shall affect and be deemed to have bound such lands from the time of such delivery thereof in like manner as any writ of *feri facias* now binds goods and chattels.

No judgment recovered to bind lands unless execution lodged with the Sheriff.

22. And be it enacted, That the term instrument hereinbefore used shall, for the several purposes of this Act, be construed to include not only conveyances and other deeds, but also all instruments in writing whatsoever whereby real or leasehold estates or stock shall be affected or shall be intended so to be.

Term instrument

23. And be it enacted, That in all cases where an acknowledgment is required to be certified under an official seal, the seal actually affixed to any such acknowledgment or to any certificate thereof, shall for the purposes of this Act be taken to be the official seal of the officer taking or certifying the same, and no evidence to prove the contrary shall be admissible in any case either at law or in equity.

As to official seals.

24. And be it enacted, That in every case where the production of any such certified copy as aforesaid or of any memorial shall be required for the purposes of evidence

Facilitating production of

REGISTRATION (DEEDS).

certified copy in evidence.

Effect of registration in the last-mentioned cases as to deeds of feoffment.

Recital of lease evidence of its execution.

Registrar or clerk neglecting duty in numbering or registering any memorial, Registrar to pay a penalty of £100.

Registrar or clerk, or person destroying, &c., any memorial, guilty of felony.

Registrar to cause proper indexes to be made and kept.

Office copies to be taken as evidence in certain cases.

Wills under envelope and seal may be deposited in the office of the Registrar General.

Limits of Port Phillip defined.

To what part of New South Wales this Act shall be applicable.

Transcript of existing

under this Act, the same shall or may be produced either by the said Registrar General or Deputy Registrar or any clerk in the office of such Registrar appointed by him for that purpose.

25. And be it enacted, That with respect to every deed of feoffment hereafter executed, of which any such certified copy as aforesaid shall be duly deposited in the office of the Registrar General in manner aforesaid, such copy shall operate as and be for all purposes equivalent to livery of seisin as to the lands and hereditaments comprised in and intended to be conveyed by such deed of feoffment the same in all respects as if there had been livery of seisin actually made and given of the same lands and hereditaments in the most valid and effectual form and manner.

26. And be it enacted, That every deed or instrument of release executed after the passing of this Act, shall be as effectual as if the releasing parties who shall have executed the same had also executed a lease or bargain and sale for a year for giving effect to such release, although no such lease or bargain and sale shall have been executed, and that the recital or mention of a lease or bargain and sale in a release executed before the passing of this Act shall be conclusive evidence of the execution of such lease or bargain and sale.

27. [False oaths made punishable.]

28. And be it enacted, That if the said Registrar General or any Deputy Registrar, or any clerk or person employed in the said Registrar's Office, shall wilfully or negligently omit to number, register, or enter, or to have numbered, registered, or entered in manner hereinbefore directed, any deed, memorial, or certificate delivered into the said office, he, the said Registrar General, shall for every such offence forfeit and be liable to pay to Her Majesty, Her Heirs and Successors, the penalty of one hundred pounds, and be further liable in damages to the party injured to the extent of the loss or injury sustained; and if the said Registrar General or Deputy Registrar, or any clerk or person whatsoever, shall destroy, embezzle, or secrete, forge, counterfeit, raise, deface, or alter any deed or memorial, or any part thereof, or any endorsement made thereon, or any entry or registry thereof in any book in the said office, with intent to defraud or injure any person or persons, such Registrar, clerk, or person so offending shall be deemed guilty of felony, and being duly convicted thereof shall be transported for life.

29. And be it enacted, That it shall be the duty of the said Registrar General and of his deputy for the time being, from time to time, to make and prescribe the form and size of copies of deeds and memorials, and other instruments to be registered in his office, so as to facilitate reference to them and render their preservation secure, and to make proper indexes to all registrations that (as far as may be) information may readily be obtained by parties interested therein as to all incumbrances and liens or instruments affecting or intended to affect real estate in the Colony.

30. And whereas it is convenient that office copies of the deeds and memorials registered or to be registered in the said Registry Office should under certain limitations be received in evidence: Be it enacted, That in all proceedings before any Court of Justice, for all purposes whatsoever, an office copy of any deed or memorial registered or to be registered in the said office shall upon such office copy being proved in like manner as an office copy of any other record, be received and taken as evidence of the contents of the deed or memorial of which it purports to be an office copy, without the production of the original copy of deed or memorial: Provided always that the party producing the same, or his attorney, shall before producing the same give reasonable notice in writing thereof to the adverse party.

31. And be it enacted, That it shall be lawful for any person residing in New South Wales to deposit in the office of the Registrar General of the said Colony, his or her last will and testament under an envelope or cover, sealed with the seal of such person, and the same shall be endorsed with such person's name, and shall remain in the said office in the custody of the said Registrar General until the decease of the testator (unless previously required to be given up by such testator), and upon the death of such person the Registrar General shall examine the same, and deliver it to the executor first named therein, or other person lawfully entitled thereto, or in case of doubt to such person or persons as the Chief Justice or any Judge of the said Court shall upon summary application order and direct.

32. And be it enacted, That the limits of the District of Port Phillip shall for the purposes of this Act comprise all such parts of the Territory of New South Wales as now are or shall at any time hereafter be comprised in the limits within which the Resident Judge of the said district now hath or may hereafter have jurisdiction.

33. And be it enacted and declared, That anything required to be done under this Act not specially declared to be applicable to that part of the Colony of New South Wales situate within the limits of the District of Port Phillip shall be held to be applicable only to that part of the said Colony not comprehended within such limits.

34. And be it enacted, That the Registrar General at Sydney shall, as soon as conveniently may be after the passing of this Act, except in the cases excepted in the said

recited Act passed in the fifth year of the reign of Her present Majesty, make out and transmit to the Deputy Registrar of the Supreme Court at Melbourne a transcript, certified under his hand, of all memorials of instruments affecting land within the District of Port Phillip, which were deposited for registration in the office of the Registrar of the Supreme Court at Sydney, and which, under the provisions of this Act, may or shall have been transferred to the office of the said Registrar General; and all such transcripts shall be received by the Deputy Registrar or other person discharging the duties of Registrar at Melbourne, and be by him entered and preserved, and shall be of the same force and effect to all intents and purposes as the original memorials at Sydney.

memorials to be transmitted to Port Phillip.

35. And whereas by an Act of the Governor and Council of New South Wales made and passed in the fifth year of the reign of His late Majesty King William the Fourth, intituled, "*An Act to remove doubts as to the validity of certain Marriages had and solemnized within the Colony of New South Wales, and to regulate the registration of certain Marriages, Baptisms, and Burials*," and whereas by a certain other Act of the said Governor and Council, passed in the third year of the reign of Her present Majesty, intituled, "*An Act for better ensuring the registration of Marriages, Baptisms, and Burials*," and whereas by a certain other Act of the said Governor and Council, passed in the fourth year of the reign of Her said Majesty, intituled, "*An Act to remove doubts as to the validity of certain Marriages had and solemnized within the Colony of New South Wales by Ministers of the Congregational or Independent and Baptist Denominations, and to regulate the registration of certain Marriages, Births, or Baptisms, and Burials*," it is enacted that the certificates of the marriages, births, baptisms, and burials mentioned in the said several Acts are to be transmitted to the Registrar of the Supreme Court of New South Wales, for the purpose of having such certificates preserved and enrolled, in the manner and at such times in such several Acts mentioned and directed; and whereas it is intended that the said several certificates shall, from and after the day on which this Act shall commence and take effect, be transmitted to the Registrar General at Sydney to be registered in his office, and not in the office of the Registrar of the Supreme Court of New South Wales: Be it enacted, That from and after the day on which this Act shall commence and take effect the certificates or registers of all marriages, births, baptisms, and burials by the said recited Acts required to be transmitted to and registered in the office of the Registrar of the Supreme Court of New South Wales shall be transmitted to and registered in the office of the Registrar General at Sydney, with the exception of such marriages, births, baptisms, and burials as shall occur within the limits of the District of Port Phillip, and in all cases occurring within the said district of Port Phillip, such certificates or registers of marriages, births, baptisms, and burials shall be transmitted to the Deputy Registrar of the said district.

Registries under 5 William IV. No. 2

3 Victoria No. 23, and

4 Victoria, No. 14, transferred to Registrar General's Office.

SCHEDULES REFERRED TO.

A.

THIS is to certify, that A.B., the wife of the within-named W.B., came before me, A.B., a Judge of the Supreme Court of New South Wales—(or before me, C.D., Registrar General of the Colony of New South Wales)—(or before me, E.F., a Commissioner appointed by the Supreme Court of New South Wales for taking Affidavits, not resident within ten miles of Sydney, and not being the person employed to prepare the within deed, nor being a party thereto), and she being by me examined apart from her said husband, acknowledged that the within instrument was executed by her, and that she was acquainted with and understood the nature and effect thereof, and she declared that she had executed the same freely and voluntarily without menace, force, or coercion, either on the part of her husband or any other person. Witness my hand and seal at the day of 18

C.D. (L.S.)
Judge, Registrar, or Commissioner, as the case may be.

N.B.—Where the acknowledgment is not by a married woman it will extend only to the fact of execution, and that the party knew the nature and effect of the instrument, and the above form must be altered accordingly, and where the acknowledgment is taken before a Judge, the Registrar, or a Commissioner, the above form must be adapted accordingly.

REGISTRATION (DEEDS).

B.

Table of Fees to be taken under this Act.

	s.	d.
1. For receiving every will, or certified copy, or memorial of any deed for registration, including verifying the same, and endorsement of receipt on original deed	7	6
2. For every acknowledgment before whomsoever made, and whether already made or to be thereafter made	10	0
3. For the enrolment of every grant of land hereafter issued under the Seal of this Colony where the quantity granted shall not exceed 50 acres	5	0
4. For ditto where the quantity shall be over 50 but not under 300 acres	7	6
5. For ditto where the quantity shall exceed 300 acres	10	0
6. For every search of copy of any deed, or of any memorial of any deed or will of one property	2	6
7. For every search for any copy of any grant of land	2	6
8. For every examined copy of memorial or of any deed not exceeding six folios	5	0
9. For every folio of 90 words exceeding six folios	0	8
10. For every extract from any memorial, will, or other writing per folio	0	8
11. For receiving and noting every will deposited for safe custody	5	0
12. For every examined copy of deed of public company or charter of incorporation per folio	0	8
13. For every search for will	1	0
14. For every search for copy of deed of settlement of public company or charter of incorporation	1	0
15. For every search for certificates of marriages, births, or baptisms, or burials	1	0
16. For every copy of such certificate	1	0

20 Vic. No. 27. An Act for transferring to the Registrar General the duties of the Chief Clerk of the Supreme Court as Registrar of Deeds and other Instruments. [11th March, 1857.] -

Preamble.

WHEREAS it is expedient to transfer to the General Registry for New South Wales all Instruments heretofore registered, recorded, or deposited in the Registry Office attached to the Supreme Court, and to vest in the Registrar General the custody thereof, and the registration, recording, and depositing of like Instruments in future: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

All Instruments, &c., in Supreme Court Registry Office to be transferred to Registrar General.

1. Upon a day to be fixed by the Governor, of which fourteen days previous notice shall be published in the *Government Gazette*, the officer then by law charged with the custody of Instruments theretofore registered, enrolled, or deposited in the Registry Office attached to the Supreme Court, shall deliver up, and the Registrar General shall take possession of the said office, and all the said Instruments of whatsoever kind, and all indexes, books, documents, and writings in the custody of the said officer relating thereto.

All duties of Registration, &c., imposed on the Registrar General.

2. Upon and from the same day all the duties now by law imposed upon, and all the powers and authorities then vested in the said officer as such, shall be transferred to and imposed upon and vested in the Registrar General, and the like fees may be taken by him for performing the said duties as may now by law be taken for the performance thereof.

Registrar General may appoint a Deputy, &c. Commissioners of Affidavits may take acknowledgments, &c.

3. It shall be lawful for the Registrar General, with the sanction of the Governor, to appoint a Deputy or Deputies, whose acts, with respect to all the duties aforesaid, shall have the same force and effect as if done by the Registrar General.

4. Every Commissioner of the Supreme Court for taking Affidavits (not residing within five miles of the city of Sydney) shall have power to take acknowledgments of married women and others, and verifications of copies of Deeds, and other Instruments requiring verification, and may receive to his own use the fees now by law payable in that behalf.

24 Vic. No. 7. An Act to further amend the Law relative to the Registration of Deeds affecting Real Estate. [20th March, 1861.]

Preamble.

WHEREAS by section eighteen of the Act twenty-second Victoria, number one, it was enacted that no instrument thereafter executed and registered under the provisions of any Act in force for the Registration of Deeds should lose any priority to which it would be entitled by virtue of such registration by reason only of bad faith in the conveying party if the party beneficially taking under such instrument acted *bona fide*, and

22 Vic. No. 1,
s. 18.

there was a valuable consideration for the same paid or given: And whereas it is expedient to extend the said provisions of the said Act as herein provided: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

1. No instrument executed prior to the commencement of the said hereinbefore-mentioned Act, and registered at any time under the provisions of any Act in force for the Registration of Deeds, shall lose or be deemed to have lost any priority to which it would be entitled by virtue of such registration, by reason only of bad faith in the conveying party, if the party beneficially taking under such instrument acted *bond fide*, and there was a valuable consideration for the same paid or given: Provided that nothing herein shall extend to any case where an adverse title has been established by the judgment of any competent Court, or shall hereafter be established by any such judgment in any action or suit now pending, or which shall be commenced within twelve months after the passing hereof. (*)

Deeds registered prior to 22 Vic. No. 1 not to lose priority by *mala fides* of conveying party.

Except where adverse title established by judgment of Court.

RESIDUES OF TESTATORS.

11 G. IV and 1 W. IV c. 40. (*) An Act for making better provision for the disposal of the undisposed of residues of the effects of Testators. [4 August, 1834.]

"WHEREAS testators by their wills frequently appoint executors, without making any express disposition of the residue of their personal estate: And whereas executors so appointed become by law entitled to the whole residue of such personal estate; and Courts of Equity have so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator has died intestate: And whereas it is desirable that the law should be extended in that respect": Be it therefore enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, That when any person shall die, after the first day of September next after the passing of this Act, having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will or any codicil thereto that the person or persons so appointed executor or executors was or were intended to take such residue beneficially.

After 1st September, 1830, executors deemed to be trustees for persons entitled to any residue under the Statute of Distributions unless otherwise directed by will.

2. Provided also, and be it further enacted, That nothing herein contained shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions, in respect of any residue not expressly disposed of.

Not to affect rights of executors where no person entitled to the residue.

REVERSIONARY INTERESTS IN PERSONALTY.

(See *Married Women*.)

(*) Adopted by 5 W. IV No. 8.

(*) A married woman sold at auction property of which she was seised in fee, but not settled to her separate use; but before the completion of the purchase she sold the same property to others, who, though having notice of the previous sale, obtained from her a conveyance, with the statutory acknowledgment, and registered it before the registration of the first contract of sale. In a suit by the first purchasers for the specific performance of their contract, and praying also that the latter purchasers should be declared trustees for them, the bill was dismissed with costs. *Fitzpatrick & others v. Barker & others*, 12, S. C. R., Eq., 83.

REVERSIONS (STATUTE OF)

REVERSIONS (STATUTE OF).

32 Hen. 8, c. 34. Concerning Grantees of Reversions, to take advantage of the Conditions to be performed by the Lessees. [1540.]

Grantees of reversions may take advantage of conditions and covenants against the lessee of the same lands.

BE it enacted, That as well all and every person or persons and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant of our said sovereign lord by his letters patent of any lordships, manors, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong or appertain to any of the said monasteries and other religious and ecclesiastical houses, dissolved, suppressed, relinquished, forfeited, or by any other means come to the King's hands, since the said fourth day of February, the seven and twentieth year of his most noble reign, or which at any time heretofore did belong or appertain to any other person or persons, and after came to the hands of our said sovereign lord, as also all other persons being grantees or assignees, to or by our said Sovereign Lord the King or to or by any other person or persons than the King's highness and the heirs, executors, successors, and assigns of every of them, shall and may have and enjoy like advantages against the lessees, their executors, administrators, and assigns, by entry for nonpayment of the rent, or for doing of waste or other forfeiture; and also shall and may have and enjoy all and every such like and the same advantage, benefit, and remedies by action only, for not performing of other conditions, covenants, or agreements, contained and expressed in the indentures of their said leases, demises, or grants, against all and every the said lessees and farmers and grantees, their executors, administrators, and assigns, as the said lessors or grantors themselves or their heirs or successors ought, should, or might have had and enjoyed, at any time or times, in like manner and form as if the reversion of such lands, tenements, or hereditaments had not come to the hands of our said sovereign lord, or as our said sovereign lord, his heirs and successors, should or might have had and enjoyed in certain cases by virtue of the Act made at the first Session of this present Parliament, if no such grant by letters patent had been made by His Highness.

Lessees may have the like remedy against the grantees of the reversions which they might have had against their grantors.

2. Moreover, That all farmers, lessees, and grantees of lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments for term of years, life or lives, their executors, administrators, and assigns, shall and may have like action, advantage, and remedy against all and every person and persons, and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant of the King our sovereign lord, or of any other person or persons, of the reversion of the same manors, lands, tenements, and other hereditaments so letten, or any parcel thereof, for any condition, covenant, or agreement contained or expressed in the indentures of their lease and leases, as the same lessees or any of them might and should have had against the said lessors and grantors, their heirs and successors; all benefits and advantages of recoveries in value by reason of any warranty in deed or in law by voucher or otherwise, excepted.

SOCAGE TENURE.

12 Car. II. c. 24. An Act for taking away the Courts of Ward and Liveries, and Tenures *in Capite*, and by Knights-Service and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof. [1660.]

All tenures to be created by the King hereafter shall be free and common Socage.

IV. And be it further enacted, &c., That all Tenures hereafter to be created by the King's Majesty, his heirs or successors, upon any gifts or grants of any manors, lands, tenements, or hereditaments, of any estate of inheritance at the Common Law, shall be in free and common Socage, and shall be adjudged to be in free and common Socage only, and not by Knights-Service or *in Capite*, and shall be discharged of all Wardship, Value and Forfeiture of Marriage, Livery, Primer Seisin, *Ousterlemain*, *Aide pur fair filz Chivalier* and *pur file marrier*; any Law, Statute, or Reservation to the contrary thereof in any wise notwithstanding.

SUPREME COURT.

(Extract from 9 Geo. IV c. 83.)

Supreme Courts to have ecclesiastical jurisdiction.

12. And be it further enacted, That the Supreme Courts respectively shall be Courts of Ecclesiastical Jurisdiction, and shall have full power and authority to administer and execute, within New South Wales and Van Diemen's Land, and the dependencies thereof respectively, such ecclesiastical jurisdiction and authority as hath been or shall be committed to the said Supreme Courts respectively by His Majesty's said charters or letters patent so issued or to be issued as aforesaid; provided that in all cases where the executor or executors of any will upon being duly cited shall refuse or neglect to take out probate, or where the next of kin shall be absent, and the effects of the deceased

shall appear to the said Courts respectively to be exposed and liable to waste, it shall be lawful to the said Courts respectively to authorize and empower the Registrar, or other ministerial officer of the said Supreme Courts respectively, to collect such effects, and hold or deposit or invest the same in such manner and place, or upon such security, and subject to such orders and directions as shall be made, either as applicable in all such cases, or specially in any case, by the said Courts respectively, in respect of the custody, control, or disposal thereof.

TITLES TO LAND.

22 Vic. No. 1. An Act to remove certain difficulties affecting Titles to Land. [30th June, 1858.]

WHEREAS from various causes many difficulties exist affecting the legal title to Land in this Colony or the establishment of the same in evidence, for the removal of which difficulties it is expedient to make the several provisions hereinafter contained: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales, in Parliament assembled, and by the authority of the same as follows:—

Certain Informa
purchases in fee.

1. In every case where, before the commencement of this Act, any person seized of, or entitled to land in fee, or entitled to have a Crown grant thereof made to him in fee, shall have sold and have conveyed or contracted to convey the same land to the party purchasing, such party shall be deemed as against the vendor, his heirs and assigns, to have taken or to be entitled to (as the case may be) an estate in fee in the same land, notwithstanding the absence of any words of inheritance in the instrument of conveyance or contract, as the case may be, unless a contrary intention shall appear by such instrument or otherwise: Provided that this section shall not defeat any ejectment or suit now pending or brought within six months after the commencement of this Act, nor prejudice the title of any person now in possession of the land and claiming under such vendor.

Sales of land by
Sheriff.

2. It shall not hereafter be necessary for any Sheriff to make an actual seizure of land under any writ in order to authorize a sale thereof, but instead of such seizure he shall cause notice of the writ and of the intended day and place of sale and the particulars of the property to be published in such manner as the Judges of the Supreme Court or the Judge at Moreton Bay, if the land be in that district, shall from time to time direct. And the publication of such notice shall be equivalent to an actual levy by him on the land indicated by such notice.

Deeds of sale by
Sheriff.

3. Every deed of sale heretofore or hereafter executed by any Sheriff of the land of a judgment debtor, or of the right, title, and interest, of such debtor to and in any land, shall be *prima facie* evidence of the existence of a valid judgment and writ to support a levy by such Sheriff on the land, and of the fact of a levy having been duly made on such land, if stated in the deed, or of such notice as aforesaid having been duly published, if that fact be so stated: And no such deed shall be deemed invalid by reason only of non-registration within one calendar month as now prescribed by law.

For remedy of
insufficient de-
scriptions in
grants.

4. No Crown grant of land heretofore issued, and no deed in which the description of the land corresponds with that contained in such grant shall be void for want of certainty in such description, in any case where the Governor shall, after the commencement of this Act, by an instrument in writing under his hand and the seal of the Colony, describe with sufficient certainty the land intended to have been comprised in such grant; but in every such case the land so described as last aforesaid shall be taken to be the land described in the grant and in every such deed as aforesaid, and to have been granted and conveyed thereby respectively.

5. Provided always that nothing in the preceding section shall prejudice any person now in possession of the land or any part thereof claiming adversely to the grantee, his heirs or assigns, or shall affect any grant of the same land, or any part thereof issued by the Crown subsequently to the first grant, or any title to the land claimed under such subsequent grant.

Proviso to pro-
tect subsequent
grants and
adverse holders.

6. No such instrument shall be signed unless the intention to make and sign the same shall have been notified under the hand of the Secretary for Lands and Public Works by three separate publications in the *Government Gazette*, and in some newspaper circulating in the district in which the land is situated, three months at the least before the time of such signing, containing therein the name of the grantee and of the party applying for such instrument, and the description in the grant as well as that proposed to be substituted: And every such instrument shall be countersigned by such Secretary and enrolled in the office for the registration of deeds.

New description
to be advertised
&c.

7. The like proceedings may be taken in respect of any Crown grant heretofore or hereafter issued in which there shall be any misnomer of the grantee or misdescription of the land granted, and in every case where an instrument in writing shall have been so signed and enrolled as aforesaid, stating therein the matters intended to be corrected,

The like pro-
visions in cases
of error in
names.

and the name or description substituted or intended so to be, such name or description shall be taken to have been inserted originally in the grant and in every deed containing the erroneous name or description, and such grant and every such deed shall operate and be construed accordingly.

Proof of instrument.

8. Any such instrument as aforesaid may be by separate writing or be indorsed on the grant to which it relates: And it shall be sufficient in any suit or action for the party adducing any such instrument to prove its enrolment without showing compliance with any other provision of the preceding section.

Cases may be referred to Commissioners for Claims to grants.

9. For any of the purposes contemplated by the five last preceding sections or any of them, it shall be lawful for the Governor to cause inquiry to be made, if he shall see fit so to do, as to the interests of any person who may be affected, or who shall represent that he will be affected by any proposed new description or correction of any error as aforesaid before the Commissioners for Claims to Grants of Land appointed under the Acts in that behalf, and to refer accordingly any application for any such instrument as aforesaid, and any claim or caveat in opposition thereto, for the report thereupon of such Commissioners, at the cost of the party or parties, as in the case of persons applying for or entering a caveat against the issue of a grant; and such Commissioners shall thereupon have power to summon and examine the parties and all witnesses where evidence may be deemed necessary, and to report to the Governor upon the matters as fully and in the same manner as upon an inquiry authorized in terms by the said Acts.

Conditions in grants.

10. No title to land shall be held bad, either at law or in equity, by reason of the breach or non-performance of any condition contained in the Crown grant of such land, in any case where it shall appear by any Proclamation, or by writing under the hand of the Governor, countersigned by the Secretary for Lands and Public Works, that no proceedings will be at any time taken on behalf of the Crown for avoiding the grant by reason of such breach or non-performance. And every such Proclamation may be in general terms applying to all conditions, or may be limited to conditions of particular classes or a particular class of cases only.

Parties claiming against grantees by matter of prior date.

11. In every case where, before the commencement of this Act, any Crown grant of land has been issued containing a proviso purporting to reserve or hold harmless the rights of all parties other than the grantee, such proviso shall, as against every *bond fide* purchaser or mortgagee for valuable consideration (whether before or after the passing of this Act) without actual notice of some adverse claim, and against all persons claiming under such purchaser or mortgagee be inoperative and void, unless the benefit of such proviso be sought by some suit or proceeding now pending, or commenced within three years, or (where the grant has issued during the last three years) within five years after the commencement of this Act.

The like in certain other cases.

12. In all other cases of land heretofore granted, and now in the possession of the grantee, his heirs, or assigns, the rights of all parties claiming adversely to such grantees, by matter, before the date of the grant, shall, as against every *bond fide* purchaser or mortgagee for valuable consideration, without actual notice of the adverse claim, and against all persons claiming under such purchaser or mortgagee, be barred and extinguished, both at law and in equity, unless some suit or proceeding to establish or enforce those rights be now pending, or shall be commenced within three years, or (where the grant has issued during the last three years) within five years after the commencement of this Act.

The like as to future grants.

13. In every case of land hereafter granted by the Crown, the rights of all parties claiming the same land adversely to the grantee, by matter, before the date of the grant shall, as against every *bond fide* purchaser or mortgagee, for valuable consideration, without actual notice of the adverse claim, and against all persons claiming under such purchaser or mortgagee, be barred and extinguished, both at law and in equity (whether there be such a proviso or reservation as aforesaid in the grant or not), unless some suit or proceeding to establish or enforce the same rights be commenced within five years after the grantee, his heirs or assigns, shall have been in occupation of the land under such grant.

Proclamations promising Crown grants.

14. Every promise heretofore made by any Governor of this Colony of a grant of land in fee to any person shall (except as against the Crown) be deemed to have conferred upon him an interest in such land, devisable by will, or alienable by contract, in like manner as Equitable Estates in land are devisable or alienable. And every such promise may be evidenced by any Proclamation, or by writing under the hand of the Governor or Colonial Secretary, or by recital or statement in any Crown grant: Provided that this section shall not defeat any ejectment or suit now pending or commenced within six months after the commencement of this Act, nor shall prejudice or affect the title of any person in possession of the land under any Crown grant, or claiming adversely to the person first referred to, his heirs or assigns. ⁽²⁷⁾

⁽²⁷⁾ *Seemle*, a promisee of a grant from the Crown has an equitable interest in the subject of the grant. *Bucknell v. Mann*, 2, S. C. R., 1. See also, *Doe dem Aspinwall v. Osborne*, S. C., January, 1848, as to operations of a conveyance of such an interest by estoppel; also *Spencer v. Gray*, S. C., September, 1848.

15. No Crown grant of land heretofore issued shall be invalidated or impeached by reason that the same was not made in pursuance or consideration of any sale, or was in pursuance of a promise made on behalf of one of Her Majesty's Royal predecessors, and not on behalf of Her Majesty, anything in the Act of Parliament passed for regulating the sale of waste Crown lands in these Colonies notwithstanding—or that the sale (in cases of sale) may have been in some manner or to some person not authorized by that Act.

Grants issued in apparent violation of 5 and 6 Vic., c. 36.

16. For the protection of purchasers and mortgagees under Crown debtors or accountants to the Crown, be it enacted, that it shall be lawful at any time for the Auditor General to take and pass the accounts of any such debtor or accountant, and upon satisfaction thereof to certify the same under his hand, and thereupon it shall be lawful for the Governor, if he shall see fit so to do, by writing under his hand, countersigned by the Colonial Secretary or Colonial Treasurer, to release all or any of the lands of such debtor or accountant in respect of all claims of the Crown against him up to the date of such release; and every such release shall have the effect of an absolute discharge of all the then lands of such debtor or accountant, or of the particular lands specified, as the case may be, in the hands of any *bond fide* purchaser or mortgagee in respect of such claims.

Lands of debtors or accountants to the Crown.

17. No registration of any instrument under any Act now or heretofore in force for the registration of deeds, or intended to be in pursuance of any such Act, shall be defeated or made ineffectual by reason of any omission, misdescription, or error in any case where the identity of the instrument in evidence with the one alleged to have been registered is established, and the substantial requirements of the Act have been complied with.

Mistakes in registration.

18. No instrument hereafter executed and registered under the provisions of any Act in force for the registration of deeds, shall lose any priority to which it would be entitled by virtue of such registration, by reason only of bad faith in the conveying party, if the party beneficially taking under such instrument acted *bond fide*, and there was a valuable consideration for the same paid or given. (*)

Registered deed, —Fraud of conveying party.

19. Livery of seizin shall not be deemed to have been necessary to give effect to any feoffment executed before the third day of January, one thousand eight hundred and forty-two, but every such feoffment shall be taken to have operated in the same manner as the same would have done in case there had been livery of seizin in the most valid form: Provided that nothing in this section shall make any such feoffment operate as a tortious conveyance, or shall prejudice or affect the title of any person now in possession of land the subject of any such feoffment, and claimed adversely to the feoffee, his heirs, or assigns.

Want of livery of seizin.

20. Every deed affecting or intended to affect land in this Colony which shall have been executed by any married woman or tenant in tail, and which purports to have been acknowledged by such woman or tenant before some person having authority in that behalf, shall be valid and effectual in its intended operation to all intents and purposes, notwithstanding that the acknowledgment indorsed on such deed may not have been taken or certified in due form.

Informal acknowledgments on deeds.

21. Every acknowledgment heretofore or hereafter made by any married woman or other person, taken before and certified by any Judge, Chief Magistrate of any City or Town, or any Commissioner of the Supreme Court of this Colony for taking acknowledgments or affidavits (or which shall purport to be so taken and certified), in any part of Her Majesty's Dominions, and whether the certificate be under seal or not, shall be as valid and effectual as if the same had been in this Colony taken before and certified in due form by a Judge of the Supreme Court of New South Wales.—And the like with respect to acknowledgments made and certified in any Foreign Country before and by any British Consul or Vice-Consul, or purporting so to be.

Certain acknowledgments to bar dower &c. provided for.

22. In all cases where a married man has conveyed or shall convey any land, either absolutely or by way of mortgage, a deed now or hereafter duly executed and acknowledged by his wife, if such acknowledgment be duly certified, shall be operative to bar her contingent right to dower, although her husband be not a party to such deed.

Dower barred although husband not a party to deed.

Semble, that previously to the passing of this Act a mere promise of land made by the Crown was not considered to confer any devisable interest on the person to whom such promise was made. *Hoaking v. Terry*, before the Privy Council on appeal, reported in 2, S. C. R., App. 17.

A., heir of B., promisee of grant from the Crown, obtained grant after B's death. *Held*, that he was not trustee of the lands for B's creditors. *Held*, that the Crown is not bound to issue grant to heir, and that A. took solely by favour of the Crown. *Held*, no lien for improvements by administrator, who was in possession as supposed heir before A. *Hillas v. Magoveran*, 2, S. C. R., 32 and 60.

As to what estate will pass under a devise of a promisee's interest; see *Norton and others v. Hoaking and another*, 6, S. C. R., p. 37.

(*) See 24 Vic. No. 7, *ante*, p. 149, tit. "Registration of Deeds,"

Trustees' receipts.

23. All persons paying money to Trustees entitled to receive the same shall be exonerated from liability in respect to the non-application or mis-application of such money, unless such liability was expressly retained or imposed by the instrument creating the trust: Provided that nothing in this section shall protect any person colluding with any Trustee in a fraud or breach of trust, or any person claiming under him, unless such last-mentioned person be a purchaser or mortgagee, for valuable consideration and without notice of the fraud or breach of trust.

Money paid into Court by mortgagor, and afterwards paid out.

24. Where the amount of principal and interest due on any mortgage shall be paid into the Supreme Court by any mortgagor under the provisions of the "Trustee Act of 1852," and the same shall afterwards be paid by virtue of an Order of the Court to the person mentioned in such order, such payment shall operate as a re-conveyance of the land comprised in such mortgage to the person who shall at the time of such payment be entitled to the equity of redemption thereof: Provided that such order be registered in the office of the Registrar of Deeds before such payment shall take effect.

Covenants to produce deeds.

25. A covenant or undertaking, whether now or hereafter entered into, to produce to any purchaser, lessee, or mortgagee of land or his assigns any deed or relating to such land shall be satisfied by a deposit of the deed permanently in the office of the Registrar of Deeds, who shall give a receipt for and keep in his office a list of all deeds so deposited, and shall permit any person, on payment of the proper fees, to inspect and obtain copies of every such deed.

Presumption of survivorship.

26. In all cases where two or more persons shall have died under circumstances rendering it uncertain which of them survived the deaths, shall, for all purposes affecting the title of land, be presumed to have taken place in order of seniority, and the younger be deemed to have survived the elder.

Commencement and title of Act.

27. This Act shall commence on the first day of July next, and may be cited for all purposes as "The Titles to Land Act of 1858."

24 Vic. No. 3. An Act to amend the "Titles to Land Act of 1858," and to legalize certain Signatures thereunder. [9th November, 1860.]

Preamble.

WHEREAS by the "Titles to Land Act of 1858" the signature of the Secretary for Lands and Public Works is required for certain purposes of the said Act: And whereas the Department of Lands and Public Works then in existence has since been divided and there is now a separate Minister for Lands, and it is expedient that his signature should be sufficient for such purposes, and that validity be given to the signature of the said Minister in certain cases under the said Act since the said division: Be it therefore enacted and declared by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales, in Parliament assembled, and by the authority of the same as follows:—

Signature of Minister of Lands to be in lieu of that Department as united with Works.

1. The intention required by the sixth section of the said recited Act to be notified in the *Gazette* under the hand of the Secretary for Lands and Public Works, and the instrument required by the same section to be countersigned by such Secretary may hereafter in all cases within the purview of the said enactment be under the hand of or countersigned by the Minister for Lands.

Same for the past rendered valid.

2. In all like cases under the said Act in which since such division of the said Department the notification shall have been under the hand of the Minister for Lands, or the instrument shall have been countersigned by such Minister, the provisions of the said Act shall be deemed to have been fully and lawfully complied with in those particulars respectively.

Short title.

3. This Act shall be styled and may be cited as the "Titles to Land Act Amendment Act of 1860."

TRUSTEES.

13 Vic. No. 19. An Act to authorize the investment of Trust Money. [5th September, 1849.]

Preamble.

WHEREAS it is desirable to provide for the investment of Trust Moneys: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, That whenever any money shall have been borrowed by the Government of this Colony, and the debt created shall constitute a negotiable security by way of Debentures or otherwise, it shall be lawful for, but not incumbent upon, all Trustees, Executors, or Administrators, unless otherwise lawfully directed, to invest all trust moneys in their hands, or any part thereof, in the purchase of such Debentures or other Government securities, and to renew such investment as often as it shall be necessary.

Trust moneys may be invested in Government securities.

16 Vic. No. 19. An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees. [2nd September, 1852.] Adopted from 13 & 14 Vic. c. 60.

WHEREAS an Act of Council was passed in the fifth year of the reign of His late Majesty King William the Fourth, for adopting and applying amongst other Acts an Act of Parliament passed in the first year of the same reign, intituled, "*An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give effect to their Decrees and Orders in certain cases*": And whereas it is expedient that the provisions of the said adopted Act should be enlarged: Be it therefore enacted by His Excellency the Governor of New South Wales, by and with the advice and consent of the Legislative Council thereof, as follows:—

1. All proceedings under the said Act commenced before the passing of this Act may be proceeded with under the said adopted Act, or according to the provisions of this Act, as shall be thought expedient, and, subject as aforesaid, so much of the said recited Act of Council as adopts and applies the Act of Parliament above particularly mentioned shall be and the same is hereby repealed: Provided always that the several Acts repealed by the said adopted Act shall not be revived. 6 W. 4 No. .
11 G. 4 and 1 W.
4 c. 60.

2. The several words hereinafter named are herein used and applied in the manner following respectively; that is to say— Repealing so much of former Act 5 Gul. IV No. 8 as adopts 11 G. 4 and 1 W. 4 c. 60.
Interpretation of terms.

The word "stock" shall mean any fund, annuity, or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein.

The word "seised" shall be applicable to any vested estate for life or of a greater description, at law and in equity, in possession or in futurity, in any lands.

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands.

The words "contingent right," as applied to lands, shall mean a contingent or executory interest,—a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained—also a right of entry, whether immediate or future, and whether vested or contingent.

The words "convey" and "conveyance," applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail, in accordance with the provisions of the Act passed in the seventh year of the reign of Her present Majesty, number sixteen, or under any future Act or enactments giving effect to conveyances by such persons as if fines with proclamations had been levied or common recoveries suffered.

The words "assign" or "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate.

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another.

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage, but with this exception the words "trust" and "trustee" shall extend to and include implied and constructive trusts, and cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person.

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent.

The word "mortgage" shall be applicable to every estate, interest, or property, in lands or personal estate, which would in a Court of Equity be deemed merely a security for money.

The word "lunatic" shall mean "any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ *de lunatico inquirendo*."

The expression "person of unsound mind" shall mean any person not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs.

Supreme Court may convey estates of lunatic trustees and mortgagees—

3. When any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Supreme Court to make an order that such lands be vested in such person or persons in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate. ⁽³⁸⁾

and may convey contingent rights of lunatic trustees and mortgagees.

4. When any lunatic or person of unsound mind shall be entitled to any contingent right in any lands, upon any trust or by way of mortgage, it shall be lawful for the Supreme Court to make an order wholly releasing such lands from such contingent right, or disposing of the same to, such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

Court may transfer stock of lunatic trustees and mortgagees.

5. When any lunatic or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the Supreme Court to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action or any interest in respect thereof; and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action or any interest in respect thereof either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons, together with any other person or persons the said Court may appoint.

Power to transfer stock of deceased person.

6. When any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Supreme Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action or any interest in respect thereof, in any person or persons he may appoint.

Court may convey estates of infant trustees and mortgagees.

7. Where any infant shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Supreme Court to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct, and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate. ⁽³⁹⁾

Contingent rights of infant trustees and mortgagees.

8. Where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Supreme Court to make an order wholly releasing such lands from such contingent right or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age; and had duly executed a deed so releasing or disposing of the contingent right.

Court may convey the estate of a trustee out of the jurisdiction of the Court.

9. When any person solely seised or possessed of any lands upon any trust shall be out of the jurisdiction of the Supreme Court, or cannot be found, it shall be lawful for the said Court to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate. ⁽³⁹⁾

Court may make order in cases where persons are seised of lands jointly with parties out of jurisdiction of Court, &c.

10. When any person or persons shall be seised or possessed of any lands jointly with a person out of the jurisdiction of the Supreme Court, or who cannot be found, it shall be lawful for the said Court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Contingent rights of trustees.

11. When any person solely entitled to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Supreme Court, or cannot be found, it shall be

⁽³⁸⁾ See a case where a vesting order was made by the Primary Judge, the vendor's heir-at-law being an infant. *Re John Cahill*, 1, S.C.R., Eq. 26.

⁽³⁹⁾ This section appears to have been applied in granting (subject however to the Queen's rights and prerogatives) an order under which a pastoral lease was vested in the purchaser from the Crown Lessee in whose name the lease had issued after the purchase. *Ex parte Ricketson*, 12, S.C.R., Eq. 1.

lawful for the said Court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

12. When any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Supreme Court, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons, together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

Court may make order in cases where persons are jointly entitled with others out of the jurisdiction of the Court to a contingent right in lands.

13. Where there shall have been two or more persons jointly seised or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor it shall be lawful for the Supreme Court to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

When it is uncertain which of several trustees was the survivor.

14. Where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Supreme Court to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

When it is uncertain whether the last trustee be living or dead.

15. When any person seised of any lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the Supreme Court to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate.

When trustee dies without an heir.

16. When any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Supreme Court to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn persons or class of unborn persons would, upon coming into existence, be seised or possessed of in such lands.

Contingent right of unborn trustee.

[17 and 18 sections repealed by 17 Vic. No. 4, s. 2. See *post*.]

19. When any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the re-conveyance of such lands, then in any of the following cases it shall be lawful for the Supreme Court to make an order vesting such lands in such person or persons, in such manner and for such estate as the said Court shall direct; that is to say—

Power to convey in place of mortgagee.

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Supreme Court or cannot be found.

When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled, as aforesaid, or a duly authorized agent of such last-mentioned person.

When it shall be uncertain which of several devisees of such mortgagee was the survivor.

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead.

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee.

And the order of the said Court made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Power to appoint a person to convey in certain cases.

20. In every case where the Supreme Court shall, under the provisions of this Act, be enabled to make an order, having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person born or unborn, it shall also be lawful for the said Court, should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance, or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the said Court, would in the particular case have had under the provisions of this Act; and in every case where the Supreme Court shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of any company or society established or to be established, it shall also be lawful for the said Court, if it be deemed more convenient, to make an order directing any officer of such company or society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this Act shall be a full and complete indemnity and discharge to all companies or societies; and their officers and servants, for all acts done or permitted to be done pursuant thereto.

When trustees of stock out of jurisdiction.

21. When any person or persons shall be jointly entitled with any person out of the jurisdiction of the Supreme Court, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said Court may appoint; and when any sole trustee of any stock or chose in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

When trustee of stock refuses to transfer.

22. Where any sole trustee of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the Supreme Court to make an order vesting the sole right to transfer such stock, or to receive the dividends or income thereof or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

When one of several trustees of stock refuses to transfer or receive and pay over dividends.

23. Where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or incomes thereof, or to sue for or recover such chose in action, according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after the request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Supreme Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees.

When stock is standing in the name of a deceased person.

24. When any stock shall be standing in the sole name of a deceased person, and his or her personal representatives shall be out of the jurisdiction of the Supreme Court, or cannot be found, or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint.

Effect of an order vesting the legal right to transfer stock.

25. Where any order shall have been made under any of the provisions of this Act vesting the right to any stock in any person or persons appointed by the Supreme Court, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons, so appointed as aforesaid, to the extent and in conformity with the provision of such order as such companies, associations, or persons would have been

bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the said Court concerning any stock shall have been given, it shall not be lawful for any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock or the payment of the dividends or produce thereof.

26. Where any order shall have been made under the provisions of this Act, by the Supreme Court vesting the legal right to sue for or recover any chose in action or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence and prosecute in his or their own name or names, any action, suit, or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

Effect of an order vesting legal right in a chose in action.

27. When a decree shall have been made by the Supreme Court directing the sale of any lands for the payment of the debts of a deceased person, every person seized or possessed of such lands, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed to be so seized or possessed or entitled, as the case may be, upon a trust within the meaning of this Act; and the said Court is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.

When a decree is made for sale of real estate for payment of debts.

28. Where any decree shall be made by the Supreme Court for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who upon coming into existence would be trustees within the meaning of this Act, and thereupon it shall be lawful for the said Court to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said Court might under the provisions of this Act make concerning the estates, rights, and interests of trustees born or unborn.

Court to declare what parties are trustees of lands comprised in any suit, and as to the interests of persons unborn.

29. It shall be lawful for the Supreme Court to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced.

Power to make directions how the right to transfer stock to be exercised.

30. Whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Supreme Court, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees.

Power to Court to make order appointing new trustees.

31. The person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted.

The new trustees to have the powers of trustees appointed by decree in suit. Power to Court to vest lands in new trustees.

32. It shall be lawful for the said Court upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees, for such estate as the Court shall direct; and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate.

33. It shall be lawful for the said Court upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any chose in action, subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees.

Power to Court to vest right to sue at law in new trustees.

34. Any such appointment by the Court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge

Old trustees not to be discharged from liability.

to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Who may apply.

35. That an order under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock, or chose in action subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock, or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof, and that an order under any of the provisions hereinbefore contained concerning any lands, stock, or chose in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage.

Power to go before the Master in the first instance.

36. When any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, from the said Court, it shall be lawful for him to exhibit before the Master in Equity of the said Court a statement of the facts whereon such order is sought to be obtained, and adduce evidence in support thereof; and if such evidence shall be satisfactory to the said Master, he shall, at the request of the person adducing such evidence, give a certificate under his hand of the several material facts found by him to be true, and of his opinion that such a person is entitled to an order in the form set forth in such certificate.

Power to petition the Court.

37. Any person who shall have obtained such certificate may apply by motion to the Supreme Court, for an order to the effect set forth in such certificate, or for such other as such person may deem himself entitled to upon the facts found by the Master.

Power to present petition in the first instance.

38. Any person or persons entitled in manner aforesaid to apply for an order from the said Court may, should he so think fit, present a petition in the first instance to the said Court for such order as he may deem himself entitled to, and may give evidence by affidavit or otherwise in support of such petition before the said Court, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof.

What may be done upon petition.

39. Upon the hearing of any such motion or petition, it shall be lawful for the said Court, should it be deemed necessary, to direct a reference to the Master in Equity of the Court to inquire into any facts which require such an investigation, or it shall be lawful for the said Court to direct such motion or petition to stand over, to enable the petitioner or petitioners to adduce evidence or further evidence before the said Court, or to enable notice or any further notice of such motion or petition to be served upon any person or persons.

Court may dismiss petition with or without costs.

40. Upon the hearing of any such motion or petition, whether any certificate or report from the Master shall have been obtained or not, it shall be lawful for the Court to dismiss such motion or petition with or without costs, or to make an order thereupon in conformity with the provisions of this Act.

Power to make an order in a cause.

41. Whenever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report of the Master, the facts necessary for an order under this Act shall appear to such Court to be sufficiently proved, it shall be lawful for the Court, either upon the hearing of the said cause or of any petition or motion in the said cause or matter, to make such order under this Act.

Orders made by the Court founded on certain allegations to be conclusive evidence of the matter contained in such allegations.

42. Whenever any order shall be made under this Act for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devise of a mortgagee is out of the jurisdiction of the Supreme Court or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any such cases the fact that the Court has made an order upon such an allegation shall be conclusive evidence of the matter so alleged in any Court of law or equity upon any question as to the legal validity of the order: Provided always that nothing herein contained shall prevent the Court directing a re-conveyance or re-assignment of any lands conveyed or assigned by any order under this Act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.

Trustees of charities.

43. It shall be lawful for the Supreme Court to exercise the powers herein conferred for the purpose of vesting any lands, stock, or chose in action in the trustee or trustees of any charity or society over which charity or society the said Court would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court, or by order made upon a petition to the said Court under any Act authorizing the said Court to make an order to that effect in a summary way upon petition.

44. No lands, stock, or chose in action vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to Her Majesty by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place.

No escheat of property held upon trust or mortgage.

45. Nothing contained in this Act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this Act had not passed.

Act not to prevent escheat or forfeiture of beneficial interest.

46. Where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock, or chose in action conveyed, assigned, or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into any of the banks established in this Colony by Acts of Council, in the name and with the privity of the Master in Equity of the Supreme Court, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in such manner as the said Court shall think fit, and to order payment or distribution thereof, or payment of the dividends or interest thereof, as to the said Court shall seem reasonable; and every cashier of any bank who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

Money of infants and persons of unsound mind to be paid into Court.

47. Where in any suit commenced, or to be commenced, in the Supreme Court it shall be made to appear to the Court by affidavit that diligent search and inquiry has been made after any person made a defendant by name, or by designation if his name be unknown, who is only a trustee, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and in the same manner as if such trustee had been duly served with the process of the Court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause: Provided always, that no such decree shall bind, affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him, as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right, or interest which such person shall have at the time of making such decree for his own use or benefit, or otherwise than as a trustee as aforesaid.

Court may make a decree in the absence of a trustee.

48. When any person shall, under the provisions of this Act, apply to the Master in Equity of the Supreme Court, in the first instance, and adduce evidence, for the purpose of obtaining the certificate of such Master, as a foundation for an order of the said Court, it shall be lawful for the said Master to order service of such application upon any person, or to dismiss such application, and to direct that the costs of any person consequent thereon shall be paid by the person making the same; and all orders of the Master under this Act shall be enforced by the same process as orders of the Court made in any suit against a party thereto.

Powers of the Master.

49. The Supreme Court may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this Act, or any of them to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Court shall think proper.

Costs may be paid out of the estate.

50. Upon any petition being presented under this Act to the Supreme Court concerning a person of unsound mind, it shall be lawful for the said Court of Equity, should it so think fit, to direct that a commission in the nature of a writ de lunatico inquirendo shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission.

Commission concerning persons of unsound mind.

51. Upon any petition under this Act being presented to the Supreme Court it shall be lawful for the said Court to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose.

Suit may be directed.

52. Whenever the person entitled to receive payment of any money secured by mortgage upon land shall indorse upon the deed of mortgage an acknowledgment under his hand, attested by one witness, of the payment of the mortgage debt in full, or of any less sum in satisfaction thereof, such indorsement shall (upon registration thereof in the manner provided by law for the registration of other instruments affecting land) operate as a discharge of the mortgage debt, and a reconveyance of all and singular the

Facilitating extinguishment of mortgages.

Facilitating redemption in case of absent or unknown mortgagor.

On claim made by petition and proof of right Court may order money to be paid provided it be proved also that all deeds have been delivered up to person or persons entitled thereto.

Master in Equity may by order of Primary Judge or of the Court invest the money paid into Court in Government securities.

Jurisdiction and powers given by this Act to be exercised by Primary Judge subject to appeal, &c.

Short title.

Commencement of Act.

hereditaments comprised in such mortgage to the person or persons who shall at the time of such payment be entitled to the equity of redemption thereof according to his and their respective interests therein. ⁽⁴⁰⁾

53. Whenever a person entitled to receive payment of any mortgage debt, or of any portion thereof, shall be out of the jurisdiction of the Supreme Court, or cannot be found within this Colony, or is unknown, or it shall be uncertain who is so entitled, it shall be lawful for the said Court upon petition for that purpose by the person entitled to redeem the mortgaged premises, to direct the amount of such mortgage debt, or of such portion as aforesaid to be paid into Court for the use of such person or persons as may thereafter claim the same, and establish his or their right thereto; and upon such payment into Court a certificate under the hand and seal of the Master in Equity that such payment was allowed and has been made shall, on registration thereof as aforesaid, operate in the same manner as an indorsement upon the mortgage deed by the person entitled as aforesaid and registered as aforesaid under the provisions hereinbefore contained respectively: Provided that before any such payment into Court shall be allowed, the amount of the debt or of such portion thereof as aforesaid shall be ascertained in such manner as the said Court or Judge may think fit, and that in respect of any amount not paid into Court, and which may eventually be shown by the person or persons claiming the same to have been in fact due or payable over and above the amount paid into Court, the same shall continue to be a debt due upon the mortgage upon the land, anything in this section to the contrary notwithstanding.

54. Upon petition by the person or persons claiming to be entitled to the money so paid into Court, and on proof of his or their right thereto, the said Court shall order the said money to be paid to the said person or persons according to his or their right or interest to and in the same: Provided that no such money shall be paid to the said person or persons under such order, until it shall be shown by the admission of the parties concerned, or otherwise, to the satisfaction of the Master in Equity of the said Court, that the deed or instrument of mortgage and all the title-deeds which were delivered by the mortgagor to the mortgagee on executing the same, or in connection therewith, have been delivered up to the person or persons by whom the said money was so paid into Court, or to his or their executors, administrators, or assigns. ^(*)

55. It shall be lawful for the said Master in Equity, by the order of the Primary Judge in Equity of the said Court, to be made without any formal request by motion, petition, or otherwise, to invest the money so paid into Court in the purchase of debentures or other negotiable securities granted by the Government of this Colony, in respect of debts contracted by the said Government.

56. The jurisdiction and powers by this Act conferred and vested in the Supreme Court shall and may be exercised and discharged by the Primary Judge thereof in Equity, or by one other Judge acting as such in his absence or during his illness, in the same manner as the ordinary equitable jurisdiction and powers of the Supreme Court are now exercised and discharged, and subject in like manner to appeal, rehearing, and review.

57. In citing this Act in other Acts of Council and in legal instruments, and in legal proceedings, it shall be sufficient to use the expression "The Trustee Act, 1852."

58. This Act shall come into operation on the first day of September, one thousand eight hundred and fifty-two.

17 Vic. No. 4. An Act to extend the Provisions of the "Trustee Act of 1852." [4th July, 1853.]

Supreme Court may make an Order for vesting the estate in lieu of conveyance by a party to the suit after a decree or order for sale.

WHEREAS it is expedient to extend the provisions of the Trustee Act of 1852: Be it therefore enacted by His Excellency the Governor of New South Wales, by and with the advice and consent of the Legislative Council thereof, as follows:—

1. When any Decree or Order shall have been made by the Supreme Court directing the sale of any lands for any purpose whatever, every person seized or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such Decree or Order shall have been made, and bound thereby, or being otherwise bound by such Decree or Order, shall be deemed to be so seized or possessed

(*) See sec. 24 of Titles to Land Act, 22 Vic. No. 1.

⁽⁴⁰⁾ In *Rouse and another v. Nixon*, 4, S. C. R., p. 345, it was held that this section applies only to the case of mortgagor and mortgagee, when the former pays off the latter's mortgage,—per Stephen, C.J.: "The 52nd section is applicable only to cases in which the registration of the mortgagee's receipt can operate as a discharge of the debt as well as a reconveyance to the person entitled to the equity of redemption."

(This section appears to have been framed after the provisions of the English Building Societies' Acts; it is not to be found in the English Trustee Acts from which this Act was adopted.)

or entitled (as the case may be) upon a Trust within the meaning of the said Trustee Act of 1852; and in every such case it shall be lawful for the said Supreme Court, if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an Order vesting such lands or any part thereof, for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct; and every such Order shall have the same effect as if such person so seized or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate.

2. Sections seventeen and eighteen of the said Trustee Act of 1852 are hereby repealed; and in every case where any person is or shall be jointly or solely seized or possessed of any lands or entitled to a contingent right therein upon any Trust, and a demand shall have been made upon such Trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned person, requiring such Trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the said Supreme Court, if the said Court shall be satisfied that such Trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an Order vesting such lands in such person, in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said Order shall have the same effect as if the Trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate.

Power to make an Order for vesting the estate on refusal or neglect of a Trustee to convey or release.

3. When any infant shall be solely entitled to any stock upon any Trust, it shall be lawful for the Supreme Court to make an Order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof; and when any infant shall be entitled jointly with any other person or persons to any stock upon any Trust, it shall be lawful for the said Court to make an Order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons jointly entitled with the infant, or in him or them together with any other person or persons the said Court may appoint.

Power to make an Order for the transfer or receipt of dividends of stock in name of an infant trustee.

4. Where any person shall neglect or refuse to transfer any stock or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an Order of the Supreme Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an Order vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

On neglect to transfer stock for 28 days Order may be made vesting right to transfer in such person as the Court shall appoint.

5. When any stock shall be standing in the sole name of a deceased person, and his personal representative shall refuse or neglect to transfer such stock or receive the dividends or income thereof for the space of twenty-eight days next after an Order of the Supreme Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an Order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint.

On like neglect by executor similar Order may be made.

6. When any Order being or purporting to be under this Act, or under the Trustee Act of 1852, shall be made by the Supreme Court, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly; and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the Order; and all Companies and Associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such Order, as such Companies, Associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

Companies and Associations to comply with such orders.

7. Every Order made or to be made, being or purporting to be made under this Act or the Trustee Act of 1852, by the Supreme Court, and duly passed and entered, shall be a complete indemnity to all Companies and Associations whatsoever, and all persons, for any act done pursuant thereto; and it shall not be necessary for such Company or Association or person, to inquire concerning the propriety of such Order, or whether the said Court had jurisdiction to make the same.

Indemnity to Company so obeying.

8. When any person is or shall be jointly or solely seized or possessed of any lands, or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the Supreme Court, upon proof of such conviction, to appoint any person to be a Trustee in the place of such convict, and to make an Order for vesting such lands, or the right to transfer such stock, and to receive the dividends

Power to appoint new Trustees in lieu of persons convicted of felony.

or income thereof, in such person to be so appointed Trustee; and such Order shall have the same effect as to lands as if the convict Trustee had been free from any disability, and had duly executed a conveyance or assignment of his estate and interest in the same.

Power to the Court to appoint new Trustees where there is no existing trustee.

Supreme Court may make order for appointment of trustees.

Act to be construed as part of Trustee Act of 1862.

9. In all cases where it shall be expedient to appoint a new Trustee, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Supreme Court, it shall be lawful for the said Court to make an Order appointing a new Trustee or new Trustees, whether there be any existing Trustee or not at the time of making such Order.

10. In every case in which the Supreme Court has jurisdiction under this Act, or the Trustee Act of 1852, to order a conveyance or transfer of land or stock, or to make a vesting Order, it shall be lawful for the said Court also to make an Order appointing a new Trustee or new Trustees.

11. This Act shall be read and construed according to the definitions and interpretations contained in the second section of the Trustee Act of 1852, and the provisions of the said last-mentioned Act (except so far as the same are altered by or inconsistent with this Act) shall extend and apply to the cases provided for by this Act, in the same way as if this Act had been incorporated with and had formed part of the said Trustee Act of 1852.

21 Vic. No. 7. An Act for better securing Trust Funds and for the relief of Trustees. [4th June, 1858.]

Preamble.

WHEREAS it is expedient to provide means for better securing Trust Funds and for relieving Trustees from the responsibility of administering Trust Funds in cases where they are desirous of being so relieved: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales, in Parliament assembled, and by the authority of the same, as follows:—

Trustees may pay moneys or transfer securities into the Supreme Court.

1. All trustees, executors, administrators, or other persons, having in their hands or under their control any moneys belonging to any trust, or the major part of them, on filing an affidavit in the Supreme Court, in its Equitable Jurisdiction, shortly describing the instrument creating the trust, according to the best of their knowledge and belief, may pay such moneys into the hands of the Master in Equity in the matter of the particular trust (describing the same by the names of the parties as accurately as may be for the purpose of distinguishing it) in trust to attend the orders of the Court; and all such persons having any Government or other stocks or securities in the United Kingdom, or in this or any other British Colony, standing in their names, or in the name of any deceased person of whom they are personal representatives, or held by them upon any trust, or the major part of them, may transfer or deposit such stocks or securities to or in the name of or with the Master in Equity with his privity in the matter of the particular trust (describing the same as aforesaid) in trust to attend the orders of the said Court; and in every such case a certificate from the Master of the fact of the money being so paid in, or of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such persons for the money, stocks, or securities so paid, transferred, or deposited.

Court may effectuate transfer, &c., by a majority of Trustees.

2. If upon a Petition presented under this Act it shall appear to the Court that moneys, stocks, or securities are vested in any persons within the meaning of this Act, and that the major part of them are desirous (or where there are only two such persons that one of them is desirous) of paying, transferring, or depositing the same under the provisions of this Act, but that for some reason the concurrence of the other or others of them cannot be had, it shall be lawful for the Court to direct such payment, transfer, or deposit to be made by the major part of them (or by one, as the case may be) without the concurrence of the others or other of them; and where any such moneys, stocks, or securities are deposited with any banker, broker, or other depository, it shall be lawful for the Court to make an Order for the payment, transfer, or delivery thereof to the major part of such persons as aforesaid, or to one of them, for the purpose of being paid, transferred, or deposited to or with the Master, as to the Court shall seem meet; and every payment, transfer, and delivery in pursuance of any such Order, shall be as valid as if made on the authority or by the act of all the persons entitled to such moneys, stocks, or securities, and shall protect and indemnify all persons acting in pursuance of such Order.

Court to make Orders for application of trust moneys.

3. Such Orders as the Court shall think fit may be from time to time made by the Court in its Equitable Jurisdiction in respect of the trust moneys, stocks, or securities paid in, transferred, and deposited as aforesaid, and for the investment and payment of such moneys, or of any dividends or interest on such stocks or securities, and for the transfer and delivery out of such stocks and securities, and for the administration of the Trust generally, upon a petition presented in a summary way to the Court by such

party or parties as to the Court shall appear to be competent in that behalf, and service of such petition shall be made upon such persons as the Court shall direct; and every Order made upon any such Petition shall have the same effect, and shall be enforced and subject to re-hearing and appeal in the same manner as if made in a suit regularly instituted in the Court: Provided that if it shall appear that any such funds cannot be safely distributed without the institution of a suit or suits the Court may direct such suit or suits to be instituted.

4. Where any Guardian, Committee, Receiver, or other Trustee appointed by the Supreme Court or the Primary Equity Judge, shall have been or shall be (either by Order in the particular cause or matter, or by any General Rule) directed to account from time to time to the Court, or to file any report or account in the Office of the Master in Equity, it shall be lawful for the Court, on the application of any party interested, or of such Master on behalf of the parties or any of them, or without any such application, to enforce compliance with every such Rule or Order by a Rule or Summons to show cause, and by Rule or Order Absolute thereupon, as in an action or proceeding at law, and to punish non-compliance with any such Rule or Order Absolute by Attachment for Contempt as in any case of Contempt at law, with costs in each case, payable by and to whom the Court shall think fit to direct.

Power to compel Trustees to account.

5. The jurisdiction and powers by this Act vested in the Supreme Court may be exercised by the Primary Equity Judge, or one other Judge acting for him in his absence or during his illness, subject nevertheless to the like appeal, re-hearing, and review as in ordinary cases; and the Judges of the said Court, or any two of them, may make such General Rules and Orders as from time to time shall seem necessary for better carrying the provisions and objects of this Act into effect.

Powers may be exercised by Equity Judge. Power to make General Rules.

26 Vic. No. 12. An Act to amend the Law of Property and further to relieve Trustees. [19th December, 1862.]

WHEREAS it is expedient further to amend the Law of Property and to relieve Trustees, and to give to Trustees, Mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same as follows:—

Preamble.

1. Where any license to do any act which without such license would create a forfeiture, or give a right to re-enter under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this Act be given to any lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment under-lease or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license); and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant, or condition, assignment, under-lease, or other matter not specifically authorized or made punishable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done.

LEASES.

Restriction on effect of license to alien.

2. Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry or assigning or under-letting or doing any other specified act without license, and a license at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or under-let his share or interest, or to do any other act prohibited to be done without license, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or under-let part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by co-lessees or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license.

Restricted operation of partial licenses.

3. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

Apportionment of conditions of entry in certain cases.

Restriction of effect of waiver.

POLICIES OF INSURANCE.

Relief against forfeiture for breach of covenant to insure in certain cases.

Record of relief granted.
Court not to relieve more than once in respect of same covenant, &c.

Lessor to have benefit of an informal insurance.

Protection of purchaser against forfeiture under covenant for insurance against fire in certain cases.

Preceding provisions to apply to leases for a term of years absolute, &c.

RENT CHARGES.

Release of part of land charged not to be an extinguishment.

POWERS.

Mode of execution of powers.

Sale under power not to be avoided by reason of mistaken payment to tenant for life.

4. Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition unless an intention to that effect shall appear.

5. The Court of Equity shall have power upon such terms as to the Court may seem fit to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise, without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the covenant to insure. ⁽¹⁾

6. The Court where relief shall be so granted, shall direct a record of such relief having been granted to be made by indorsement on the lease or otherwise.

7. The Court shall not have power under this Act so to relieve the same person more than once in respect of the same covenant or condition; nor shall it have power to grant any relief under this Act where a forfeiture under the covenant in respect of which relief is sought shall have been already waived out of Court in favour of the person seeking the relief.

8. The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relating to the building, or other property, covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant as he would have from an insurance effected in conformity with the covenant.

9. Where, on the *bond fide* purchase after the passing of this Act of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase an insurance in conformity with the covenant, the purchaser, or any person claiming under him, shall not be subject to any liability by way of forfeiture or damages or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant.

10. The preceding provisions shall be applicable to leases for a term of years absolute, or determinable on a life or lives or otherwise, and also to a lease for the life of the lessee or the life or lives of any other person or persons.

11. The release from a rent charge of part of the hereditaments charged therewith shall not extinguish the whole rent charge, but shall operate only to bar the right to recover any part of the rent charge out of the hereditaments released, without prejudice, nevertheless to the rights of all persons interested in the hereditaments remaining unreleased and not concurring in or confirming the release.

12. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing, made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity: Provided always that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise, than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

13. Where under a power of sale a *bond fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase money as the value of the timber or other articles, it shall be lawful for the Supreme Court in its Equitable Jurisdiction, upon any bill or claim or application in a summary way, as the case may require or permit, to declare

(1) See the remarks of Hargrave, J., in *Kingston v. Gale*, 4, S. C. R., p. 223.

that upon payment by the purchaser or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest under the direction of the Court upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established: And upon such payment and settlement being made accordingly the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed: And the costs of the said application, as between solicitor and client, shall be paid by the purchaser or the claimant under him.

14. Where any testator shall have charged his real estate or any specific portion thereof with the payment of his debts or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money as aforesaid by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other; and any deed of mortgage so executed may reserve such rate of interest and fix such period of repayment as the person executing the same shall think proper.

15. The powers conferred by the next preceding section shall extend to all and every person in whom the estate devised shall for the time being be vested by survivorship descent, or devise, or to any person who may be appointed under any power in the will, or by the Supreme Court in its Equitable Jurisdiction, to succeed to the trusteeship vested in such devisee in trust aforesaid.

16. If any testator who shall have created such a charge as is described in the next but one preceding section shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee, the executor for the time being named in such will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee in trust for the said hereditaments, and such power shall from time to time devolve to and become vested in the person (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not prevent the necessity for getting in any outstanding subsisting legal estate.

17. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by the three next preceding sections, or either of them, shall have been duly and correctly exercised by any person acting in virtue thereof.

18. The provisions contained in sections fourteenth, fifteenth, and sixteenth, shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act; but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed; and the said several sections shall not extend to a devise to any person in fee or in tail; or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee to sell or mortgage as he may by law now do.

19. Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate, or future, or contingent, or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised, to the uses and the continued existence in him or elsewhere of any seisin to uses or scintilla juris, shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or scintilla juris be deemed to be suspended or to remain or to subsist in him or elsewhere.

20. Where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend and the descent shall thenceforth be traced from the person last entitled to the lands as if he had been the purchaser thereof.

21. The next preceding section shall be read as part of the Act third and fourth William the Fourth, chapter one hundred and six, adopted in this Colony by the Act seventh William the Fourth, number eight.

22. Any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and any other person, by the like means as he might assign the same to another.

23. Any seller or mortgagor of land, or of any chattels, real or personal, or chooses in action conveyed or assigned to a purchaser, or mortgagee, or the solicitor or agent of any such seller or mortgagor, who shall after the passing of this Act conceal any settlement,

Devisee in trust may raise money by sale notwithstanding want of express power in the will.

Powers given by last section extended to survivor's devisees, &c.

Executor in certain cases vested with like power as devisee in trust as respects raising money.

Purchasers, &c., not bound to inquire as to powers.

Sections 14, 15, and 16 not to affect certain sales, &c., nor to extend to devisees in fee or in tail.

Provision for cases of future and contingent uses.

INHERITANCE.
Descent how to be traced.

Preceding section incorporated with 3 and 4 Wm. 4 c. 106.

ASSIGNMENT OF PERSONALITY.

Assignment to self and others.

PURCHASERS.

Punishment of vendor, &c., for fraudulent concealment of deeds, &c., or falsifying pedigree.

deed, will, or other instrument material to the title or any incumbrance from the purchaser or mortgagee, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, and being found guilty shall be liable, at the discretion of the Court, to suffer such punishment, by fine or imprisonment for any time not exceeding two years, with or without hard labour, or by both, as the Court shall award; and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them in consequence of the settlement, deed, will, or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree: And in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land; but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of Her Majesty's Attorney General, or in case that office be vacant of Her Majesty's Solicitor General; and no such sanction shall be given without previous notice of the application for leave to prosecute to the person intended to be prosecuted in such form as the Attorney General or the Solicitor General (as the case may be) shall direct.

Extended limits for recovering mortgaged land.

24. Notwithstanding anything contained in the Imperial Act for the limitation of actions and suits relating to real property, which Act was adopted by the Colonial Act, eighth William Fourth, number three, it shall be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Imperial Act, to make an entry or bring an action at law or suit in equity, to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued.

Mortgages to be pledges at law as in equity, and not to affect mortgagor's rights of action.

25. All mortgages of real or personal estate shall hereafter be deemed at law as now in equity pledges only of the property thereby mortgaged, and nothing in any such mortgage shall prevent the title of any mortgagor or person claiming and being in possession from being deemed a good title at law, subject to such pledge as against all persons other than the mortgagee and those claiming under him: Provided that nothing in this enactment contained shall interfere with or prejudice the legal rights and remedies of mortgagees and those claiming under them, for the preservation and enforcement of their securities, nor shall affect any action or proceeding commenced before the twentieth day of November one thousand eight hundred and sixty-two. ⁽⁴²⁾

TRUSTEES, EXECUTORS, RECEIVERS, TRUST ESTATES, AND INVESTMENTS.

Trustee, &c., making payment under power of attorney not to be liable by reason of death of party giving such power.

26. No trustee, executor, or administrator making any payment or doing any act *bond fide* under or in pursuance of any power of attorney shall be liable for the moneys so paid or the act so done, by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power, provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act *bond fide* done as aforesaid by such trustee, executor, or administrator, was not known to him: Provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor, or administrator if the money had not been paid away under such power of attorney.

As to liability of executor or administrator in respect of rents, covenants, or agreements.

27. Where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and shall have

⁽⁴²⁾ This provision, that mortgages shall be deemed at Law as in Equity as "pledges only" of the mortgaged property, does not in any way affect a mortgagee's rights,—*Mate v. Kidd and another*, 2, S. C. R., p. 270—where, in an action by mortgagee against tenant for rent accrued since he had received notice of the mortgage, the Court held that it was no defence either at Law or in Equity that before the receipt of such notice the defendant had surrendered the residue of his term to his landlord, the mortgagor, who, up to that time had, with the mortgagee's consent, remained in receipt of the rents and profits. See also the remarks of Wise, J., at page 274 of this case (*ubi supra*), as to the evils which might result from the alteration of the law effected by this section. See also *Dwyer and others v. O'Neill*, 2, S. C. R., p. 275, following the reasoning in *Mate v. Kidd*.

set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be,) of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease, and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease, but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the persons to or amongst whom the said assets may have been distributed.

28. In like manner, where an executor or administrator liable as such to the rent, covenants, or agreements contained in any conveyance on chief rents or rent charges, whether any such rent be by limitation of use, grant, or reservation, or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance, but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the persons to or among whom the said assets may have been distributed.

As to liability of executor or administrator in respect of rents, &c., in conveyances on rents charge.

29. Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Supreme Court, in its Equitable Jurisdiction, in an administration suit for creditors and others to send in to the executor or administrators their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in this Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of any person who may have received the same respectively.

As to distribution of the assets of testator or intestate after notice given by executor or administrator.

30. Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition, or by summons upon a written statement to the Primary Judge in Equity, for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate, such application to be served upon or the hearing thereof to be attended by all persons interested in such application, or such of them as the said Judge shall think expedient; and the trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said Judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject matter of the said application: Provided nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction of such Judge, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction: Provided also that every such petition or statement shall be signed by the party, his counsel or attorney, and that the Judge may require the petitioner or applicant to

Trustee, executor, &c., may apply by petition for opinion, advice, &c., in management, &c., of trust property.

attend him in Chambers or in Court when he deems it necessary, and such party may appear by counsel or attorney, and the costs^(*) of such application as aforesaid shall be in discretion of the Judge to whom the said application shall be made. ⁽⁴³⁾

Every trust instrument to be deemed to contain clauses for the indemnity and reimbursement of the trustees.

31. Every deed, will, act, or other instrument creating a trust either expressly or by implication shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following; that is to say:—"That the trustees or trustee for the time being of the said deed, will, or other instrument shall be respectively chargeable only for such moneys, stocks, fund, and securities as they shall respectively actually receive notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument."

As to investments by trustees.

32. When a trustee, executor, or administrator shall not by some instrument creating his trust, be, or at any time heretofore have been, expressly forbidden to invest any trust fund or real securities in any part of the Colony of New South Wales or in the Government Stock of the said Colony, it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock, and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper. ⁽⁴⁴⁾

Investment in England may be substituted for investments in this Colony under certain limitations, and vice versa.

33. Any person who under or by virtue of any direction, trust, or direction already or hereafter given, created, or reserved in any last will or other testamentary disposition, marriage, or other settlement of real or personal property, or other deed, agreement, or writing is or shall be expressly authorized or directed to lend money at interest on real or Government securities in New South Wales or on real or Government securities in England, may in like manner as so authorized and directed in all other respects lend the same or any part thereof at interest on real or Government securities in England or in New South Wales, *mutatis mutandis*, and such person shall not on account of so lending money be deemed in a Court of Equity guilty of any breach of trust or held accountable, further or otherwise, than if the money had been laid out by him on real or Government securities where so expressly authorized or directed: Provided that every such loan in which any minor, or unborn child, or person of unsound mind is or may be interested shall be made under the order of the Supreme Court in its Equitable Jurisdiction made in a summary way upon petition or motion with proper notice: Provided also, that no such loan shall be made without the consent of any person whose consent may be required to the investment so expressly authorized or directed, testified in the manner required by such direction, trust, or power: Provided further, that this enactment shall not apply to any case in which such direction, trust, or power as aforesaid doth or shall contain any express restriction against the investment of such money as hereby authorized: And provided lastly, that nothing herein contained shall be construed to relieve any person intrusted or clothed with such direction, trust, or power as aforesaid from any responsibility as to title, security, or otherwise, either at law or in equity save as aforesaid.

^(*) Acted upon by Hargrave, P.J., in *re Usher's Will*, 4, S.C.R., Eq., p. 90.

⁽⁴³⁾ Where, in a petition under this section for the opinion of the Court, it appeared that no power of sale was given by the will in question, his Honor (Milford, P.J.) advised an application to the Legislature for a Private Act to enable the petitioners to sell. In the matter of the Will of Thos. Parnell and the Trust Property Act of 1863; 2, S.C.R., Eq., p. 87. Held, also by Milford, P.J., that this section requires the Judge to give his advice on questions of law, so as to guide petitioner (trustee)—to tell him what it is lawful for him to do—not to tell him how he is to exercise a discretionary power.

The Court will decline to give the executors of a partner in a large mercantile firm its judicial advice, opinion, or direction, as to the acceptance of a settlement from the surviving partners where the matter in question involves only a personal responsibility resting on the executors themselves, and depends on their own knowledge of the facts of the case, the position of all parties interested in the firm and its transactions, and on mercantile probabilities and commercial prudence, arising from detailed information beyond the cognizance of the Court. *Re Trusts of J. Gilchrist's Will*, 6, S.C.R., Eq., p. 74.

⁽⁴⁴⁾ Trustees would appear to be liable for any loss to the trust funds if they lend more than two-thirds of the value upon freehold lands of permanent value, or more than one-half on freeholds or buildings of a fluctuating value. See *Yeo and wife v. Kotton and anr.*, 4, S.C.R., Eq., p. 110.

34. The Judges of the Supreme Court or any two of them, the Primary Judge in Equity being one, may make such general orders from time to time as to the investment of cash under the control of the Court, in such stocks, funds, or securities as they shall see fit, and may make separate orders for the conversion of any securities now standing or which may hereafter stand in the name of any officer of the said Court in trust in any cause or matter into any such other stocks, funds, or securities upon which by any such general order as aforesaid cash under the control of the Court may be invested, all orders for such conversion being made upon petition to be presented by any of the parties interested in a summary way: Provided that such parties shall be served with notice thereof and the Court shall direct.

35. When any such general order as aforesaid shall have been made, it shall be lawful for trustees, executors, or administrators having power to invest their trust funds upon Government securities or upon public or parliamentary stocks, funds, or securities, or any of them, to invest such trust funds or any part thereof in any of the stocks, funds, or securities in or upon which by such general order cash under the control of the Court may from time to time be invested.

Trustees, &c., to invest trust funds in the stocks, &c., in which cash under the control of the Court may be invested.

36. Whereas by the Imperial Act third and fourth William the Fourth, chapter twenty-seven, section forty, adopted in this Colony by eighth William the Fourth number three, it was enacted that after the thirty-first day of December, one thousand eight hundred and thirty-three, no action or suit or other proceeding should be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy but within twenty years next after a present right to receive the same should have accrued to some person capable of giving a discharge for or release of the same, unless such acknowledgment in writing or payment of principal or interest as therein mentioned should have been given or made, and then within twenty years next after such payment or acknowledgment or the last of such payments or acknowledgments: And whereas it is expedient that the said enactment should be extended to the case of claims to the estates of person dying intestate: Be it therefore enacted that after the thirty-first day of December one thousand eight hundred and sixty-two no suit or other proceeding shall be brought to recover the personal estate or any share of the personal estate of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share or some interest in respect thereof shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same or his agent to the person entitled thereto or his agent, and in such case no such action or suit shall be brought, but within twenty years after such accountings payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments if more than one was made or given.

Extension of sect. 40 of 3 & 4 Wm. 4 c. 27, s. 40, to cases of claims to estates of intestates.

37. The order to take an account of the debts and liabilities affecting the personal estate of a deceased person, pursuant to the nineteenth section of the Colonial Act sixteenth Victoria number three, may be made immediately, or at any time after probate or letters of administration shall have been granted, and such order may be made by the Primary Judge in Equity upon motion or petition of course, or in Chambers upon a summons in the form used for originating proceedings at Chambers; and after any such order shall have been made, the said Judge may, on the application of the executors or administrators, by motion or summons restrain or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having or claiming to have any demand upon the estate of the deceased by reason of any debt or liability due from the estate of the deceased upon such notice and terms and conditions (if any) as to the said Judge shall seem just; and the Judge in directing an account of debt and liabilities pursuant to any such order shall, on the application of the executors or administrators, be at liberty to direct that the particulars only of any claim or claims which may be brought in pursuance of any such order shall be certified by the Master without any adjudication thereon, and any notices for creditors to come in which may be published in pursuance of any such order shall have the same force and effect as if such notices had been given by the executors or administrators in pursuance of the twenty-eighth section of this Act.

Order to take account of debts, &c., of deceased person under section 19 of 16 Vict No. 3, may be made immediately after probate granted.

38. In all cases where by any will, deed, act, or other instrument it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally or in any particular event, over any hereditaments named or referred to in or from time to time, subject to the uses or trusts of such will, deed, act, or other instrument, it shall be lawful for such trustees or other persons, whether such hereditaments, be vested in them or not, to exercise such power of sale by selling such hereditaments, either together or in lots, and either by auction or private contract, and either at one time or at several times, and (in case the power shall expressly authorize an exchange) to exchange any hereditaments which for the time being shall be subject

POWERS OF TRUSTEES FOR SALE.

Persons empowered to sell may sell in lots and either by auction or private contract.

to the uses or trusts aforesaid for any other hereditaments in this Colony or other specified Colony or Country, and upon any such exchange to give or receive any money for equality of exchange.

Sale may be made under special conditions and trustees may buy in &c.

39. It shall be lawful for the persons making any such sale or exchange to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale or contract for sale or exchange, as they shall think fit, and also to buy in the hereditaments or any part thereof at any sale by auction, and to rescind or vary any contract for sale or exchange, and to re-sell the hereditaments which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby, and no purchaser under any such sale shall be bound to inquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase money in the purchase of any other hereditaments or otherwise.

Trustees exercising power of sale, &c., empowered to convey.

40. For the purpose of completing any such sale or exchange as aforesaid, the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question either by way of revocation and appointment of the use, or otherwise, as may be necessary.

Moneys arising from sales, &c., to be laid out in other lands.

41. The money received upon any such sale or for equality of exchange as aforesaid, shall be laid out in the manner indicated in that behalf in the will, deed, act, or other instrument containing the power of sale or exchange, or if no such indication be therein contained as to all or any part of such money, then the same shall with all convenient speed be laid out in the purchase of other hereditaments in fee simple in possession to be situate in this Colony or other specified Colony or Country, or of lands of a leasehold tenure which in the opinion of the persons making the purchase, are convenient to be held therewith or with any other hereditaments for the time being, subject to the subsisting uses or trusts of the same will, deed, act, or other instrument in which the power of sale or exchange was contained; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations, to which the hereditaments sold or given in exchange were or would have been subject, or as near thereto as the deaths of parties and other intervening accidents will admit of, but not so as to increase or multiply charges; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be of leasehold tenure shall be settled and assured upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations, as shall as nearly as may be correspond with and be similar to the aforesaid uses, trusts, intents, and purposes, powers, provisoes, and declarations, but not so as to increase or multiply charges, and so that if any of the hereditaments so to be purchased shall be held by lease for years the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years; and any such purchase as aforesaid may be made subject to any special conditions as to a title or otherwise: Provided that no leasehold tenement shall be purchased under the powers hereinbefore contained which is held for a less period than sixty years.

Or in payment of incumbrances.

42. Provided nevertheless, that it shall be lawful for the persons exercising any such power as aforesaid, if they shall think fit, in lieu of applying any money to be received upon any sale or for equality of exchange as aforesaid or any part thereof in purchasing lands therewith, to apply the same in or towards paying off or discharging any mortgage or other charge or incumbrance which shall or may affect all or any of the hereditaments which shall then be subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were or was subject.

Until purchase of lands, &c., money to be invested at interest.

43. Until the money to be received upon any sale or for equality of exchange as aforesaid shall be disposed of in the manner herein mentioned, the same shall be invested at interest for the benefit of the same parties who would be entitled to the hereditaments to be purchased therewith as aforesaid, and to the rents and profits thereof in case such purchase and settlement as aforesaid were then actually made.

Trustees of renewable leaseholds may renew.

44. It shall be lawful for any trustees of any leaseholds which are renewable from time to time either under any covenant or contract, or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of such trustees, if thereunto required by any person having any beneficial interest, present or future, or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same.

Money for equality of exchange and

45. In case any money shall be required for the purpose of paying for equality of exchange as aforesaid, or for renewal of any lease as aforesaid, it shall be lawful for the

persons effecting such exchange or renewal to pay the same out of any money which may then be in their hands in trust for the persons beneficially interested in the lands to be taken in exchange, or comprised in the renewed lease, whether arising by any of the ways and means hereinbefore mentioned or otherwise, and notwithstanding the provisions for the application of money arising from sales or exchanges hereinbefore contained; and if they shall not have in their hands as aforesaid sufficient money for the purposes aforesaid, it shall be lawful for such persons to raise the money required by mortgage of the hereditaments to be received in exchange or contained in the renewed lease (as the case may be), or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments taken in exchange or comprised in the renewed lease (as the case may be) shall be subject, and for the purpose of effecting such mortgage such persons shall have the same powers of conveying or otherwise assuring as are herein contained with reference to a conveyance on sale; and no mortgagee advancing money upon such mortgage purporting to be made under this power shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purposes aforesaid. ⁽¹⁵⁾

for renewal of leases may be raised by mortgage, &c.

46. No such sale or exchange as aforesaid, and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid, shall be made without the consent of the person appointed to consent by the will, deed, act, or other instrument, or if no such person be appointed, then of some person not being under disability, entitled in possession to the receipt of the rents and profits of such hereditaments; but this clause shall not be taken to require the consent of any person where it appears from the will, deed, act, or other instrument to have been intended that such sale, exchange, or purchase should be made by the person making the same without the consent of any other person.

No sale, &c., to be made without consent of tenant for life, &c.

47. Where any principal money is secured or charged by deed on any hereditaments of any tenure, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators, and assigns, shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers, to the same extent (but no more) as if they had been in terms conferred by the person creating the charge; namely:—

POWERS OF MORTGAGES.

Powers incident to mortgages.

1st. A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner.

2nd. A power to insure and keep insured from loss or damage by fire the whole or any part of the property (whether affixed to the freehold or not) which is in its nature insurable, and to add the premiums paid for any such insurance to the principal sum secured at the same rate of interest.

3rd. A power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

48. Receipts for purchase money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase money.

Receipts for purchase money sufficient discharges.

49. No such sale as aforesaid shall be made until after six months notice in writing, given to the person or one of the persons entitled to the property subject to the charge, by serving such notice personally upon such person or persons, or by leaving the same at his or their usual or last known place of abode or business, but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize

Notice to be given before sale, but purchaser relieved from inquiry as to circumstances of sale.

⁽¹⁵⁾ A deed of settlement of certain lands contained a power to the trustees "to make sale, assign, alien, and dispose of all or any part" of the trust property at the written request and direction of the settlor, and after his decease at their own discretion, and declared that "for the purpose of effecting such dispositions and conveyances, but not for any other purpose," it should be lawful for the trustees by deed to revoke the uses and trusts of the settlement respecting the lands "so purposed to be sold," and to declare and appoint such other uses, trusts, &c., as might be thought necessary or expedient, "in order to effectuate such sales, dispositions, and conveyances." The trustees applied to the Court for its opinion whether they had, under the circumstances, power to raise a sum of money for purposes beneficial to the *cestui que trusts* by mortgage instead of sale. The Court was of opinion that the trustees had power to raise the money by mortgage, and to execute a valid mortgage of the trust property for purposes mentioned in the petition. *Re Bingham's Settlement*, 6, S. C. R., Eq., p. 97.

- the exercise of such power, or that no such notice as aforesaid had been given; but any person damaged by any such unauthorized exercise of such power shall have his remedy in damages against the person selling.
- Application of purchase money.** 50. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same, as follows:—First, in payment of all the expenses incident to the sale, or incurred in any attempted sale; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and, thirdly, in discharge of all the principal moneys then due in respect of such charge; and the residue of such money shall be paid to the person entitled to the property, subject to the charge, his heirs, executors, administrators, or assigns, as the case may be.
- Conveyance to the purchaser.** 51. The person exercising any power of sale hereby conferred shall have power to convey or assign by deed to, and vest in the purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of.
- Owner of charge may call for title-deeds and conveyance of legal estate.** 52. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover, from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered, or assigned to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of, and where the legal estate shall be outstanding in a trustee the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.
- Appointment of receiver.** 53. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may from time to time, if any person has been named in the deed of charge for that purpose, appoint any such person to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint as receiver any person he may think fit.
- Receiver deemed to be the agent of the mortgagor.** 54. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for the acts or defaults of such receiver, unless otherwise provided for in the charge.
- Powers of receiver.** 55. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues, and profits of the property of which he is appointed receiver, by action, suit, distress, or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.
- Receiver may be removed.** 56. Every receiver appointed as aforesaid may be removed by the like authority or on the like requisition as before provided with respect to the original appointment of a receiver, and a new receiver may be appointed from time to time.
- Commission to receiver.** 57. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges, and expenses whatsoever, such a commission, not exceeding eight per centum on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then four per centum on such gross amount.
- Receiver to insure if required.** 58. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge (whether affixed to the freehold or not) which is in its nature insurable.
- Application of moneys received by him.** 59. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of all taxes, rates, and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any, and in the next place in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is receiver, or on any part thereof, and subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators or assigns.
- This part to relate to charges by way of mortgage only.** 60. The powers and provisions aforesaid relating to mortgages relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan or to secure an existing or future debt.
- FURTHER PROVISIONS AS TO TRUST FUNDS** 61. Trustees having trust money in their hands which it is their duty to invest at interest shall be at liberty, at their discretion, to invest the same in any public funds or Government securities, or real securities in any part of the Colony; and such trustees

shall also be at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid, for others of the same nature: Provided that no such original investment as aforesaid (except in Government Debentures of the Colony), and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust fund for his life or for a term of years determinable with his life, or for any greater estate without the consent in writing of such person.

On what securities trust funds may be invested.

62. In all cases where any property is held by trustees in trust for an infant, either absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardian (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not; and such trustees shall accumulate all the residue of such income, by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulation shall have arisen: Provided that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Trustees may apply income of property of infants, &c., for their maintenance.

63. Whenever any trustee, either original or substituted, and whether appointed by the Court or otherwise, shall die, or desire to be discharged from or refuse or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, act, or other instrument creating the trust (if any), or if there be no such person able and willing so to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or administrators of the last surviving and continuing trustee, or for the last retiring trustee, by instrument in writing, to appoint any new trustee or trustees in the place of the trustee or trustees so dying or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid; and so often as any new trustee or trustees shall be so appointed as aforesaid all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors, or administrators of any trustee, shall by virtue of such instrument and without other assurance in the law, become and be conveyed, assigned and transferred, so that the same shall thereupon become and be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require; and every new trustee or trustees to be appointed as aforesaid, and also every trustee appointed by the Court either before or after the passing of this Act, shall have the same powers, authorities, and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the deed, will, act, or other instrument creating the trust.

Provisions for appointment of new trustees on death, &c.

64. The power of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator.

Appointment of new trustees in cases herein named.

65. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give, and execute such agreements, instruments of composition, releases, and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby.

Executors may compound, &c.

66. For the purposes of this Act a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land or personal property; although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

Tenants for life &c. may execute powers notwithstanding incumbrances.

67. None of the powers or incidents hereby conferred or annexed to particular offices, estates, or circumstances shall take effect or be exercisable if it is declared in the deed, will, act, or other instrument creating such offices, estates, or circumstances that they shall not take effect; and where there is no such declaration, then if any variations or limitations of any of the powers or incidents hereby conferred or annexed are contained in such deed, will, act, or other instrument, such powers or incidents shall be exercisable or shall take effect only subject to such variations or limitations.

Powers &c. hereby given may be negated by express declaration.

- No persons other than those entitled under the settlement &c. to be affected. 68. Nothing in this Act contained shall be deemed to empower any trustee or other person to deal with or affect the estates or rights of any person whomsoever, except to the extent to which such trustee or other person might have dealt with or affected the estates or rights of such person if the deed, will, act, or other instrument under which such trustee or other person is empowered to act had contained express powers for him so to deal with or affect such estates or rights.
- Operation of Act. 69. This Act shall except where otherwise provided extend to all deeds, wills, acts, or other instruments or trusts executed, passed, or created, as well before as after the passing of this Act.
- Interpretation of terms. 70. In the construction of this Act the term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged, or charged as security for the repayment of money or money's worth lent, and to be reconveyed, reassigned, or released on satisfaction of the debt, and the term "mortgagor" shall be taken to include every person by whom any such conveyance, assignment, pledge or charge as aforesaid shall be made, and the term "mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge, or charge as aforesaid is made or transferred, and the term "judgment" shall be taken to include registered decrees, orders of Courts of Equity and Insolvency, and other orders having the operation of judgments.
- Short title. 71. This Act shall be styled and may be cited as the "Trust Property Act of 1862."

USES AND TRUSTS.

27 Hen. VIII, c. 10. An Act concerning Uses and Wills. [1535-6.]

[Preamble, &c.]

The possession of lands shall be in him or them that have the use. (46) That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner means (*sic*) whatsoever it be; that in every such case all and every such person and persons and bodies politic that have, or hereafter shall have, any such use, confidence, or trust, in fee simple, fee tail, for term of life or for years or otherwise, or any use, confidence, or trust in remainder or reverter, shall from henceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and possession of and in the same honors, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates as they had or shall have in use, trust, or confidence of and in the same; and that the estate, title, right, and possession that was in such person or persons that were, or hereafter shall be, seised of any lands, tenements, or hereditaments to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence, or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust that was in them.

Assurance made of divers to the use of one or some of them.

2. That where divers and many persons be, or hereafter shall happen to be, jointly seised of and in any lands, tenements, rents, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any of them that be so jointly seised, that in every such case that those person or persons which have, or hereafter shall have, any such use, confidence, or trust in any such lands, tenements, rents, reversions, remainders, or hereditaments, shall from henceforth have, and be deemed and adjudged to have, only to him or them that have, or hereafter shall have, any such use, confidence, or trust, such estate, possession, and seisin of and in the same lands, tenements, rents, reversions, remainders, and hereditaments, in like nature, manner, form, condition, and course as he or they had before in the use, confidence, or trust of the same lands, tenements, or hereditaments; saving and reserving to all and singular persons and bodies politic, their heirs and successors, other than those person or persons which be seised or hereafter shall be seised of any lands, tenements, or hereditaments, to any use,

(46) A testator whose property consisted of real estate, leasehold lands, and a squatting station fully stocked, and ready money, devised the whole to his wife, jointly with F. and H., their survivors and survivor, and the heirs and executors of such survivor, upon trust to permit her "to have the full benefit and enjoyment" of the property for life, and then upon trust to divide it among all his children—the boys at twenty-one, and the girls at that age or upon marriage. *Held*, that the trustees had such an estate or interest in the personality as would enable them to interfere to protect the interests of those in remainder, and to prevent the commission of waste in respect to such interests. *Frost v. Healy and others*, 4, S.C.R., Eq. 6.

confidence, or trust, all such right, title, entry, interest, possession, rents, and action as they, or any of them, had, or might have had, before the making of this Act. And also saving to all and singular those persons, and to their heirs, which be or hereafter shall be seised to any use, all such former right, title, entry, interest, possession, rents, customs, services, and action as they or any of them might have had to his or their own proper use, in or to any manors, lands, tenements, rents, or hereditaments, whereof they be or hereafter shall be seised to any other use, as if this present Act had never been had nor made, anything in this Act contained to the contrary notwithstanding.

Saving of the right of feoffees to use.

3. "And where also divers persons stand and be seised of and in any lands, tenements, or hereditaments, in fee simple or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them, and to his or their heirs, one annual rent of *x li* or more or less, out of the same lands and tenements, and some other person, one other annual rent to him and his assigns for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared limited and made thereof : " Be it enacted, that in every such case the same persons, their heirs and assigns, that have such use and interest, to have and perceive any such annual rents out of any lands, tenements or hereditaments, that they and every of them, their heirs and assigns, be adjudged and deemed to be in possession and seisin of the same rent, of and in such like estate as they had in the title, interest, or use of the said rent or profit, and as if a sufficient grant or other lawful conveyance had been made and executed to them, by such as were or shall be seised to the use or intent of any such rent to be had, made, or paid according to the very trust or intent thereof; and that all and every such person and persons as have or hereafter shall have any title, use, and interest in or to any such rent or profit, shall lawfully distrain for non-payment of the said rent, and in their own names make avowries, or by their bailiffs or servants make consurances and justifications, and have all other suits, entries, and remedies for such rents, as if the same rents had been actually and really granted to them, with sufficient clauses of distress, re-entry, or otherwise, according to such conditions, pains, or other things, limited and appointed, upon the trust and intent for payment or surety of such rent.

Land assured to the use that rent should be paid out thereof to some other.

4. That whereas divers persons have purchased, or have estate made and conveyed of and in divers lands, tenements, and hereditaments unto them and to their wives, or to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for term of their lives, or for term of life of the said wife, or where any such estate or purchase of any lands, tenements, or hereditaments hath been or hereafter shall be made to any husband and to his wife, in manner and form expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife as is before rehearsed, for the jointer of the wife; that then, and in every such case, every woman married, having such jointer made or hereafter to be made, shall not claim nor have title to have any dower of the residue of the lands, tenements, or hereditaments that at any time were her said husband's by whom she hath any such jointer, nor shall demand nor claim her dower of and against them that have the lands and inheritances of her said husband, but if she hath no such jointer, then she shall be admitted and enabled to pursue, have, and demand her dower by writ of dower after the due course and order of the common laws of this realm: this Act or any law or provision made to the contrary thereof notwithstanding.

A woman shall not have both a jointure and dower of her husband's lands.

5. Provided always, that if such woman be lawfully expelled or evicted from her said jointer, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments whereof she was before dowable as the same lands and tenements so evicted and expelled shall amount or extend unto.

A woman shall be endowed whose jointure is recovered.

6. [Women heretofore married.]

7. Provided also, that if any wife have or hereafter shall have any manors, lands, tenements, or hereditaments, unto her given and assured after marriage for term of her life, or otherwise in jointer, except the same assurance be made to her by Act of Parliament, and the said wife after that fortune to outlive her said husband, in whose time the said jointer was made or assured unto her, that then the same wife so over-living shall and may, at her liberty, after the death of her said husband, refuse to have and take the lands and tenements so to her given, appointed, or assured, during the coverture, for term of her life or otherwise in jointer, except the same assurance be to her made by Act of Parliament as is aforesaid, and thereupon to have, ask, demand, and take her dower by writ of dower or otherwise, according to the common law, of and in all such lands, tenements, and hereditaments, as her husband was and stood seised of any state of inheritance at any time during the coverture; anything contained in this Act to the contrary thereof notwithstanding.

A jointure after marriage may be taken or refused by the wife.

This statute shall extinguish no statute of recognizance.

8. Provided also, that this present Act or anything herein contained, extend, nor be at any time hereafter interpreted, expounded, or taken to extinct, release, discharge, or suspend any statute, recognizances, or other bond, by the execution of any estate of or in any lands, tenements, or hereditaments, by the authority of this Act to any person or persons, or bodies politic; anything contained in this Act to the contrary thereof notwithstanding.

9. [Wills made before or shortly after the statute.]

10. [How fines, reliefs, and heriots shall be paid to the King.]

11. [Other lord's fines, reliefs, and heriots.]

12. [*Cestui que use*, may take all such advantages as his feoffees might have had.]

13. [Actions now depending.]

14. [Wardships, liveries, or ouster le main, of any now being within age, or of full age.]

15. [Recognisances taken to the King's use concerning recoveries.]

16. [Estates of lands executed to persons born in Wales.]

WILLS. (*)

32 Henry VIII, c. 1. The Act of Wills, Wards, and Primer Seisins, whereby a man may devise two parts of his land. [1540.] (v)

32 H. VIII, c. 1.

"WHERE the King's Most Royal Majesty in all the time of his most gracious and noble reign hath ever been a merciful, loving, benevolent, and most gracious sovereign lord unto all and singular his loving and obedient subjects, and by many times past hath not only showed and imparted to them generally by his many, often, and beneficial pardons heretofore by authority of his parliament granted, but also by divers other ways and means, many great and ample grants and benignities, in such wise as all his said subjects been most bounden to the uttermost of all their powers and graces by them received of God to render and give unto His Majesty their most humble reverence and obedient thanks and services, with their daily and continual prayer to Almighty God, for the continual preservation of his most royal estate in most kingly honor and prosperity; yet always His Majesty being repleat and endowed by God with grace, goodness, and liberality, most tenderly considering that his said obedient and loving subjects cannot use or exercise themselves according to their estates, decrees, faculties and qualities, or to bear themselves in such wise as that they may conveniently keep and maintain their hospitalities and families, nor the good education and bringing up of their lawful generations, which in this realm (laud be to God) is in all parts very great and abundant, but that in manner of necessity, as by daily experience is manifested and known, they shall not be able of their proper goods, chattels, and other movable substance, to discharge their debts, and after their degrees set forth and advance their children and posterities; wherefore our said sovereign lord most virtuously considering the mortality that is to every person at God's will and pleasure most common and uncertain, of his most blessed

(*) These Acts of Henry VIII, although repealed by the new Wills Act (1 Vic. c. 26), are still applicable to wills made before the 1st January, 1840. The same remark applies to sections 5, 6, 12, 19, 20, 21, and 22 of the Act 29 Car. II, c. 3, generally known as the Statute of Frauds (see these sections, sub tit. "Frauds, Statute of," *ante*). The earlier Acts referred to will be found in Chitty's Collection, sub tit. "Wills."

(v) Testator by his will, executed in 1824, made a general devise of all the residue of his real estate not otherwise disposed of, whether in possession, reversion, remainder, or expectancy, to E. T. and the heirs of his body. By a codicil made in 1834, he revoked that devise, and devised all his real estate "not otherwise disposed of" by his will or codicil to trustees, in trust for E. T. for life, and at E. T.'s decease, if he should have lawful issue, to E. T.'s heirs, and in default to the testator's own right heirs. Subsequent to the date of this codicil, and in the year 1835, the testator acquired by purchase other real estate. In 1836 he executed another codicil, by which he altered the devises contained in the will and codicil, but made no mention of the estate acquired in 1835. This codicil contained these passages: "And whereas by my said will or codicil, or one of them, I did give and bequeath all my real estate, not specifically otherwise disposed of, to trustees therein named, in trust for my son, E. T." "Now, I hereby revoke and annul such part of my said bequest as relates to my own right heirs, and hereby devise and bequeath the same real estate, in the event of my said son's death without issue, to all the children of J. T., and of my nephew J. H., and of my daughter H., who shall be then living, share and share alike, as tenants in common." *Held, i.e.,* affirming the judgment of the Supreme Court, that the last codicil did not amount to a republication of the will and former codicil so as to pass the real estate subsequently acquired, but was confined to the dispositions of the estate he was seized of at the date of the will, and that the testator died intestate as to the after-acquired real estate. *Hughes v. Hosking*, 11, Moore's P.C. Reports, 1.

disposition and liberality being willing to relieve and help his said subjects in their said necessities and debility, is contented and pleased that it be ordained and enacted by authority of this present parliament in manner and form as hereafter followeth"; that is to say, That all and every person and persons having, or which hereafter shall have, any manors, lands, tenements or hereditaments, holden in soccage, or of the nature of soccage tenure, and not having any manors, lands, tenements or hereditaments holden of the King our sovereign lord by knights service, by soccage tenure in chief, or of the nature of soccage tenure in chief, nor of any other person or persons by knights service from the twentieth day of July, in the year of our Lord God M.D.XL., shall have full and free liberty, power, and authority to give, dispose, will, and devise, as well by his last will and testament in writing, or otherwise by act or acts lawfully executed in his life, all his said manors, lands, tenements, or hereditaments, or any of them, at his free will and pleasure; any law, statute, or other thing heretofore had, made or used to the contrary notwithstanding.

Lands holden in soccage, and none in chief, or by knights service.

Tenants in fee, &c., may by will devise the same.

2. That all and every person and persons having manors, lands, tenements, or hereditaments, holden of the King our sovereign lord, his heirs or successors, in soccage, or of the nature of soccage tenure in chief, and having any other manors, lands, tenements, or hereditaments holden of any other person or persons in soccage, or of the nature of soccage tenure, and not having any manors, lands, tenements, or hereditaments, holden of the King our sovereign lord by knights service, nor of any other lord or person by like service, from the twentieth day of July, in the said year of our Lord God M.D.XL., shall have full and free liberty, power, and authority to give, will, dispose, and devise, as well by his last will or testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements, and hereditaments, or any of them, at his free will and pleasure; any law, statute, custom, or other thing heretofore had, made, or used to the contrary notwithstanding.

Lands holden of the King in soccage in chief, and none holden by knights service.

3. Saving away, and reserving to the King our sovereign lord, his heirs and successors, all his right, title, and interest, of *primer seisin* and reliefs, and also all other rights and duties for tenures in soccage, or of the nature of soccage tenure in chief, as heretofore hath been used and accustomed, the same manors, lands, tenements, or hereditaments to be taken, had and sued out of and from the hands of His Highness, his heirs and successors, by the person or persons to whom any such manors, lands, tenements, or hereditaments shall be disposed, willed, or devised, in such and like manner and form as hath been used by any heir or heirs before the making of this statute; and saving and reserving also fines for alienations of such manors, lands, tenements, or hereditaments holden of the King our sovereign lord in soccage, or of the nature of soccage tenure in chief, whereof there shall be any alteration of freehold or inheritance made by will or otherwise, as is aforesaid.

A saving of the King's *primer seisin*, and his fines for alienation.

34 and 35 Henry VIII, c. 5. The Bill concerning the Explanation of Wills. [1542-3.]

"WHERE, in the last Parliament begun and holden at Westminster, the twenty-eighth day of April, in the thirty-first year of the King's most gracious reign, and there by divers prorogations holden and continued unto the twenty-fourth day of July, in the thirty-second year of his said reign, it was by the King's most gracious and liberal disposition showed towards his most humble and obedient subjects, ordained and enacted how and in what manner lands, tenements, and other hereditaments might be by will or testament in writing, or otherwise by any act or acts lawfully executed in the life of every person given, disposed, willed, or devised, for the advancement of the wife, preferment of the children, payment of debts of every such person, or otherwise, at his will and pleasure, as in the same act more plainly is declared: sithen the making of which estatute, divers doubts, questions, and ambiguities have risen, been moved, and grown, by diversity of opinion taken in and upon the exposition of the letter of the same estatute."

Recites part of 32 H. VIII, c. 1.

2. For a plain declaration and explanation whereof, and to the intent and purpose that the King's obedient and loving subjects shall and may take the commodity and advantage of the King's said gracious and liberal disposition, the lords spiritual and temporal, and the commons in this present parliament assembled, most humbly beseechen the King's Majesty, that the meaning of the letter of the same estatute, concerning such matters hereafter rehearsed, may be by the authority of this present parliament enacted, taken, expounded, judged, declared, and explained in manner and form following:

3. First, Where it is contained in the same former statute, within divers articles and branches of the same, that all and singular person and persons having any manors, lands, tenements, or hereditaments of the estate of inheritance, should have full and free liberty, power and authority to give, will, dispose, or assign, as well by his last will

The words
"estate of in-
heritance" how
to be understood.

Fee simple in
coparcenery,
common, &c.
Persons seised in
fee simple,
whether in pos-
session, rever-
sion, remainder,
&c., may devise,
&c.
Devising of rent
or common out
of land.

Lands holden of
the King by
knights service
in chief.

and testament in writing, or otherwise by any act or acts lawfully executed in his life, his manors, lands, tenements, or hereditaments, or any of them, in such manner and form as in the same former Act more at large it doth appear. Which words of "estate of inheritance," by the authority of this present parliament, is and shall be declared, expounded, taken, and judged of estates in fee-simple only.

4. And also that all and singular person and persons having a sole estate or interest in fee-simple, or seised in fee simple, in coparcenery or in common in fee-simple, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, remainder, or of rents or services incident to any reversion or remainder, and having no manors, lands, tenements, or hereditaments holden of the King, his heirs or successors, or of any other person or persons by knight's service, shall have full and free liberty, power, and authority to give, dispose, will, or devise to any person or persons (except bodies politic and corporate) by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, by himself solely, or by himself and other jointly, severally, or particularly, or by all those ways, or any of them, as much as in him of right is or shall be, all his said manors, lands, tenements, rents, and hereditaments, or any of them, or any rents, commons, or other profits or commodities out of or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure; any clause in the said former act notwithstanding.

5. That all and singular person and persons, having a sole estate or interest in fee-simple, or seised in fee-simple in coparcenery, or in common in fee-simple, of or in any manors, lands, tenements, rents, or other hereditaments in possession, reversion, or remainder, or of and in any rents or services incident to any reversion or remainder, holden of the King by knights service in chief, or of the nature of knights service in chief, hath, and by the authority of this present Parliament shall have, full and free liberty, power and authority to give, dispose, will, or assign to any person or persons (except bodies politic and corporate) by his last will and testament, in writing or otherwise by any act or acts lawfully executed in his lifetime by himself solely, or by himself and others jointly, severally, or particularly, or by all those ways or any of them, as much as in him of right is or shall be, two parts as well of all the said manors, lands, tenements, rents, and hereditaments, as of all and singular his other rents and hereditaments, or of any of them, or any rents, commons, or other profits or commodities out of or to be perceived of the same two parts, or out of any parcel thereof in three parts to be divided, or as much thereof as shall amount to the full and clear yearly value of two parts thereof, in three parts to be divided, of what person or persons soever the same be holden, at his free will and pleasure.

6. That the said will so declared shall be good and effectual for two parts of the said manors, lands, tenements, and hereditaments, although the will so declared be made of the whole, or of more than of two parts of the same: The same division to be made and set forth by the deviser or owner of the same manors, lands, tenements, and hereditaments, by his last will in writing, or otherwise in writing; and in default thereof, by a commission to be granted out of the King's court of the wards and liveries, upon the inquiry of the true value thereof by the oaths of twelve men, and return or certificate thereof, had in the same court, of the said manors, lands, tenements, and hereditaments, division to be made by the master of the wards and liveries, if the master of the wards and liveries for the time being, and the parties thereunto, cannot otherwise agree upon the same division: And that the issue and profits of the two parts of the same manors, lands, tenements, and hereditaments, upon every such division to be restored to them that shall have right or title to the same from the death of the owner or deviser thereof.

7. That all and singular person and persons, having a sole estate or interest in fee-simple, or seised in fee-simple in coparcenery, or in common in fee-simple, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, or of and in any rents or services incident to any reversion or remainder holden of the King, his heirs, or successors, by knights service, and not in chief, or holden of any other person or persons by knights service, shall have full and free liberty, power, and authority, to give, dispose, will, or devise to any person or persons (except bodies politic and corporate) by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life by himself solely, or by himself and others jointly, severally or particularly, or by all those ways, or any of them, as much as in him of right is or shall be, two parts of all the said manors, lands, tenements and hereditaments, or any of them so holden by knights service, or any rents, common or other profits or commodities out of or to be perceived of the same two parts, or out of any parcel thereof in three parts to be divided, or as much thereof as shall amount to the full and clear yearly value of two parts thereof in three parts to be divided at his free will and pleasure.

8. That the said will, so declared by authority aforesaid, shall be good and effectual for two parts of the said manors, lands, tenements, and hereditaments, although thy will so declared be or shall be made of the whole lands and tenements so holden be

Lands holden of
the King by
knights service,
and lands holden
in socage.

A will made of
the whole shall
be good for two
parts.

knights service, or of more than two parts of the same; and also for the whole of all other such manors, lands, tenements, and hereditaments, or any of them, not holden of the king by knights service in chief, or otherwise by knights service, nor of any other person by knights service, and of any rents, commons or other profits or commodities out of or to be perceived of the same, or out of any parcel thereof, at his free will and pleasure; the same division to be made and set forth by the owner of the said manors, lands, tenements, and hereditaments, by his last will and testament in writing, or otherwise in writing; and in default thereof, for as much of the same manors, lands, tenements, and hereditaments as shall concern the King's interest, by commission to be directed out of the King's court of the wards and liveries for the time being and the parties thereunto cannot otherwise agree upon the same division; and that restitution of the issues and profits of the two parts thereof shall be had and made in manner and form abovesaid: And for such of the said manors, lands, tenements, and hereditaments as shall concern the interest of any other lord or lords, by commission to be granted out of the King's court of chancery, to inquire thereof by the oaths of twelve men, if the same lord or lords and the parties thereunto cannot otherwise agree upon the same division.

How the division of the two parts in three shall be set forth.

14. That wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, or person within the age of twenty-one years, idiot, or by any person *de non sane* memory, shall not be taken to be good or effectual in the law.

Persons incapacitated to devise their lands.

(*) 29 Car. II, c. 3. An Act for Prevention of Frauds and Perjuries. [1676.]

5. That from and after the said twenty-fourth of June, all devises and bequests of any lands or tenements, devisable either by force of the statute of wills or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

Devises of lands shall be in writing and attested by three or four witnesses.

6. And moreover, no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall at any time after the said twenty-fourth of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

How the same shall be revocable.

12. And for the amendment of the law in the particulars following; be it enacted, That from henceforth any estate *pur autre vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in the case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

Estates *pur autre vie* shall be devisable.

And shall be assets in the heir's hands.

19. And for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury; be it enacted, That from and after the aforesaid twenty-fourth day of June, no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the same did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased; and in the house of his or her habitation or dwelling, or where he or she has been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

Nuncupative wills.

20. That after six months passed after the speaking of the pretended testamentary wills, no testimony shall be received to prove any will nuncupative, except the said cupative wills testimony or the substance thereof, were committed to writing within six days after the making of the said will.

Probate of nuncupative wills.

(*) See the sections of this Act not relating to Wills, sub tit. "Frauds (Statute of.)"

21. That no letters testamentary, or probate of any nuncupative will shall pass the seal of any Court till fourteen days at the least after the decease of the testator be fully expired, nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow or next of kindred to the deceased, to the end they may contest the same if they please.

Repeal of wills.

22. That no will in writing, concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words or will by word of mouth only, except the same be in the life of the testator, committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

Soldiers' and mariners' wills excepted.

23. Provided always, That notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages, and personal estate, as he or they might have done before the making of this Act.

The jurisdiction of Courts saved

24. That nothing in this Act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estate, but that the prerogative Court of the Archbishop of Canterbury, and other ecclesiastical Courts, and other Courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect, subject nevertheless to the rules and directions of this Act.

25 Geo. II, c. 6. An Act for avoiding and putting an end to certain doubts and questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in His Majesty's Colonies and Plantations in America. (*) [1752.]

29 Car. II, c. 3.

Devisee, &c., attesting the devise void, but be admitted to prove the will.

1. Be it enacted, That if any person shall attest the execution of any will or codicil which shall be made after the 24th day of June, 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act; notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will or codicil. (46)

Creditor attesting, admitted a witness.

2. That in case by any will or codicil already made, or hereafter to be made, any lands, tenements, or hereditaments are or shall be charged with any debt or debts; and any creditor whose debt is so charged, hath attested or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act.

(*) This Act, though repealed by the Wills Act now in force, is still applicable to all wills made before 1st January, 1840.

(46) The plaintiff claimed certain land as devisee under the will and codicil of J. H. Both those instruments were dated before the Wills Act, 1 Vic. No. 26, came into operation in this Colony, and both were executed so as to pass real estate—being each attested by three witnesses. The devise in question was contained in the will, which also included another devise to the plaintiff, viz., an estate called Shanes Park. The plaintiff was one of the attesting witnesses to the will, but was not a witness to the codicil. The latter which was dated a few days after the will, and written on the same parchment, was in the following terms:—"I J. H. being of sound mind, &c., do also give, devise, and bequeath to (the plaintiff) all my household furniture, books, clothes and other chattels, with the stock, consisting of horses and other cattle at Shanes Park, which I may possess at my decease. I also declare that the foregoing will, bearing my seal and signature, and witnessed by J. F., S. S., and J. H. (the plaintiff) together with this codicil is my last will and testament"; and the execution was attested in the following form—"Signed, sealed, published, and declared by said testator J. H., as and for his last will and testament, in the presence of, &c." Held, that by the operation of the Act 25 Geo. II, c. 6, the devise to the plaintiff in the will was void, by reason of his being one of the attesting witnesses thereto; and that the codicil had not the effect of reviving or setting it up. *Harris v. Smart*, 9, S. C. R., p. 83. [Vice-Chancellor Bacon, however, in *Anderson v. Anderson*, 13, L.R., Eq., 381, held that a duly attested codicil had the effect of republishing and incorporating the will, so as to render a gift void under this statute valid notwithstanding attestation of the will by the donee's wife.—Ed.]

3. That if any person hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil, which shall be made on or before the said 24th day of June, 1752, to whom any legacy or bequest is or shall be thereby given, whether charged upon lands, tenements, or hereditaments, or not; and such person before he shall give his testimony concerning the execution of any such will or codicil shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest upon tender made thereof; such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act, notwithstanding such legacy or bequest.

Legatee who has been paid, or shall refuse his legacy, admitted as a witness.

4. Provided always, That in the case of such tender and refusal as aforesaid, such person shall in nowise be entitled to such legacy or bequest, but shall be for ever afterwards barred therefrom; and in case of such acceptance as aforesaid, such person shall retain to his own use the legacy or bequest which shall have been so paid, satisfied, or accepted, notwithstanding such will or codicil shall afterwards be adjudged or determined to be void for want of due execution, or for any other cause or defect whatsoever.

After refusal he is barred from the legacy; but after acceptance may retain.

5. That in case any such legatee as aforesaid, who hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said 24th day of June, 1752, shall have died in the lifetime of the testator, or before he shall have received or released the legacy or bequest so given to him as aforesaid, and before he shall have refused to receive such legacy or bequest on tender made thereof, such legatee shall be deemed a legal witness to the execution of such will or codicil, within the intent of the said Act, notwithstanding such legacy or bequest.

Legatee attesting and dying in the lifetime of the testator, or before he has received or refused his witness.

6. Provided always, That the credit of every such witness so attesting the execution of any will or codicil in any of the cases in this Act before mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court and the jury before whom any such witness shall be examined, or his testimony or attestation made use of; in like manner to all intents and purposes as the credit of witnesses in all other cases ought to be considered of and determined.

Credit of the witness to be determined by the Court, &c.

7. That no person to whom any beneficial estate, interest, gift, or appointment, shall be given or made, which is hereby enacted to be null and void as aforesaid, or who shall have refused to receive any such legacy or bequest on tender being made as aforesaid; and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand or take possession of, or receive any profits or benefit of or from any such estate, interest, gift, or appointment so given or made to him, in or by any such will or codicil; or demand, receive or accept from any person or persons whatsoever, any such legacy or bequest, or any satisfaction or compensation for the same, in any manner or under any colour of pretence whatsoever.

No devisee where the devise is made void, &c., being examined, &c., shall afterwards take any benefit.

8. Provided always, That this Act or anything herein contained, shall not extend or be construed to extend to the case of any heir at law, or of any devisee in a prior will or codicil of the same testator, executed and attested according to the said recited Act, or any person claiming under them respectively, who has been in quiet possession for the space of two years next preceding the 6 day of May, 1751, to such lands, tenements, and hereditaments, whereof he has been in quiet possession as aforesaid; and also that this Act or anything herein contained, shall not extend or be construed to extend to any will or codicil, the validity or due execution whereof have been contested in any suit in law or equity, commenced by the heir of such deviser or the devisee in such prior will or codicil, for recovering the lands, tenements, or hereditaments mentioned to be devised in any will or codicil so contested, or any part thereof, or for obtaining any other judgment or decree relative thereto, on or before the said 6th day of May, 1751, and which has been already determined in favour of such heir at law or devisee in such prior will or codicil, or any person claiming under them respectively, or which is still depending, and has been prosecuted with due diligence; but the validity of every such will or codicil, and the competency of the witnesses thereto, shall be adjudged and determined in the same manner to all intents and purposes as if this Act had never been made; anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

Cases where the validity of wills and competency of witnesses are not affected.

9. Provided always nevertheless, That no possession of any heir at law or devisee, in such prior will or codicil as aforesaid, or of any person claiming under them respectively, which is consistent with or may be warranted by or under any will or codicil attested according to the true interest and meaning of this Act, or where the estate descended or might have descended to such heir at law, till a future or executory devise by virtue of any will or codicil attested according to this Act should or might take effect, shall be deemed to be a possession within the intent and meaning of the clause herein last before contained.

Possessions which are not comprehended within the meaning of the preceding clause.

39 and 40 Geo. III, c. 98. An Act to restrain all Trusts and Directions in Deeds or Wills whereby the Profits or Produce of Real or Personal Estate shall be accumulated and the beneficial enjoyment thereof postponed beyond the time therein limited. (*) [28th July, 1800.]

No person by deed or will, &c., shall settle or dispose of any real or personal property, in such manner that the rents or produce shall be accumulated for a longer period than the life of the settler; or 21 years after his decease or during the minority of any party living at his decease; or the minorities of persons beneficially entitled. Any other direction shall be void, and the rents, &c., go to the persons entitled thereto.

Nothing herein to extend to any provision for payment of debts, or for raising portions for children, or touching the produce of timber.

Restrictions shall take effect with respect to bills made before the passing of this Act, only where the testator shall live, &c., 12 months after the passing of this Act.

"Whereas it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained:" be it enacted, That no person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any grantor or grantors, settler or settlers; or the term of twenty-one years from the death of any such grantor, settler, deviser, or testator; or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mère* at the time of the death of such grantor, deviser, or testator; or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will or other assurances, directing such accumulations would for the time being, if of full age, be entitled to the rents, issues and profits, or the interest, dividends or annual produce, so directed to be accumulated: and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

2. Provided always, That nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler or deviser, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but all such provisions and directions shall and may be made and given as if this Act had not passed.

4. Provided also, That the restrictions in this Act contained shall take effect and be in force, with respect to wills and testaments made and executed before the passing of this Act, in such case only where the deviser or testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of this Act.

WILLS (ADOPTING ACT).

3 Vic. No. 5. An Act for adopting a certain Act of Parliament, intituled, "*An Act for the amendment of the Laws with respect to Wills*," in the Administration of Justice in New South Wales, in like manner as other Laws of England are applied therein. [6th August, 1839.]

Preamble.

7 W. IV. and 1 Vic. c. 28.

Adopted and applied in the administration of justice in New South Wales.

Commencement of Act.

WHEREAS a certain Act of Parliament was passed in the year one thousand eight hundred and thirty-seven, intituled, "*An Act for the amendment of the laws with respect to Wills*": And whereas it is expedient to adopt and apply the said recited Act of Parliament in the administration of Justice in New South Wales: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, That the said recited Act of Parliament shall be and the same is hereby adopted and directed to be applied in the administration of justice in the said Colony and its Dependencies, from and after the time hereinafter mentioned, in like manner as other laws of England are therein applied.

2. And whereas it is expedient that the said recited Act of Parliament should not commence or take effect in the Colony of New South Wales until the first day of January next ensuing: Be it enacted, That the said recited Act of Parliament shall not commence or take effect in the Colony aforesaid before the first day of January, one thousand eight hundred and forty, and that every clause and provision in the said recited Act shall, on, from, and after the said day of January, have only the same effect in the Colony of New South Wales as the same have had in Her Majesty's Kingdom of England, from and after the first day of January, one thousand eight hundred and thirty-eight.

(*) This Act is more commonly known as the "Thellusson Act."

7 W. IV, and 1 Vic. cap. 26. An Act for the amendment of the Laws with respect to Wills. [3rd July, 1837.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows (that is to say)—The word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled "*An Act for taking away the Court of Wards and Liveries, and Tenures in capite, and by Knights Service, and Purveyance, and for selling a Revenue upon His Majesty in lieu thereof*" or by virtue of an Act passed in the Parliament of Ireland, in the fourteenth and fifteenth years of the reign of King Charles the Second intituled "*An Act for taking away the Court of Wards and Liveries and Tenures in capite and by Knights Service*," and to any other testamentary disposition: And the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein: And the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein: And every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing: And every word importing the masculine gender only shall extend and be applied to a female as well as a male.

2. And be it further enacted, That an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled, "*The Act of Wills, Wards, and Primer Seisins*," whereby a man may devise two parts of his land; and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled, "*The Bill concerning the explanation of Wills*," and also an Act passed in the Parliament of Ireland in the tenth year of the reign of King Charles the First, intituled "*An Act how lands, tenements, &c., may be disposed by Will or otherwise, and concerning Wards, and Primer Seisins*"; and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled, "*An Act for prevention of Frauds and Perjuries*"; and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled "*An Act for prevention of Frauds and Perjuries*," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act, passed in the fourth and fifth years of the reign of Queen Anne, intituled, "*An Act for the amendment of the Law and the better advancement of Justice*," and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled, "*An Act for the amendment of the law and the better advancement of Justice*" as relates to witnesses to nuncupative wills; and also, so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled, "*An Act to amend the Law concerning Common Recoveries and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled, 'An Act for prevention of Frauds and Perjuries'*," as relates to estates, *pur autre vie*; and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled, "*An Act for avoiding and putting an end to certain doubts and questions relating to the attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in His Majesty's Colonies and Plantations in America*," except so far as relates to His Majesty's Colonies and Plantations in America; and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "*An Act for the avoiding and putting an end to certain doubts and questions relating to the attestations of Wills and Codicils concerning Real Estates*"; and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled, "*An Act to remove certain difficulties in the disposition of Copyhold Estates by Will*," shall be and the same are hereby repealed, except so far as the same Acts, or any of them respectively, relates to any wills or estates *pur autre vie* to which this Act does not extend.

Meaning of certain words in this Act.

"WILL."

12 Car. II, c. 24.

14 and 15 Car. II (1.)

"Real Estate."

"Personal Estate."

Number.

Gender.

Repeal of the Statutes 32 H. VIII, c. 1, and 34 and 36 H. VIII, c. 6.

10 Car. I, Sess. 2, c. 2 (1.)

29 Car. II, c. 3, ss. 5, 6, 12, 19 to 22.

7 W. III, c. 12 (1.)

4 and 5 Anne, c. 16, s. 14.

6 Anne, c. 10 (1.)

14 G. II, c. 20, s. 9.

25 G. II, c. 6 (except as to Colonies).

25 G. II, c. 11 (1.)

5 G. III, c. 192.

All property may be disposed of by will.

3. And be it further enacted, That it shall be lawful for every person to devise, bequeath, or dispose of by his will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made: and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

As to the fees and fines payable by devisees of customary and copyhold estates.

4. Provided always and be it further enacted, That where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will, shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling, such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money, as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills of customary freeholds and copyholds to be entered on the Court rolls, and the lord to be entitled to the same fine, &c., when such estates are not now devisable, as he would have been from the heir.

5. And be it further enacted, That when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the Court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it will be sufficient to state in the entry on the Court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services, shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

Estates *pur autre vie*.

6. And be it further enacted, That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of

the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal, or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

7. And be it further enacted, That no will made by any person under the age of twenty-one years shall be valid. No will of a minor valid.

8. Provided also, and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act. Nor of a feme covert.

9. And be it further enacted, That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction (*), and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. Every will to be in writing and signed in the presence of two witnesses.

10. And be it further enacted, That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required, and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity. Appointments by will to be executed like other wills, &c.

11. Provided always and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act. Soldiers' and mariners' wills excepted.

12. And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of His Majesty King George the Fourth, and the first year of the reign of His late Majesty King William the Fourth, intituled "*An Act to amend and consolidate the Laws relating to the pay of the Royal Navy*," respecting the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other moneys payable in respect of services in Her Majesty's Navy. Act not to affect provisions of 11 G. IV. and 1 W. IV c. 20, with respect to wills of petty officers, &c.

13. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof. Publication not to be requisite.

14. And be it further enacted, That if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid. Will not void by incompetency of witness.

15. And be it further enacted, That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such persons attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife, or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will. Gifts to an attesting witness to be void.

16. And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof. Creditor attesting to be admitted a witness.

17. And be it further enacted, That no person shall on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof. Executor to be admitted a witness.

18. And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions.) Will to be revoked by marriage.

(*) See 17 Vic. No. 5, s. 1, *post*.

No will to be revoked by presumption.

In what cases wills may be revoked.

No alteration in a will shall have any effect unless executed as a will.

How revoked will shall be revived.

When a devise not to be rendered inoperative, &c.

A will to speak from the death of the testator.

What a residuary devise shall include.

What a general devise shall include.

What a general gift shall include.

How a devise without words of limitation shall be construed.

How the words "die without issue" or "die

19. And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

20. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.⁽⁴⁹⁾

21. And be it further enacted, That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

22. And be it further enacted, That no will or codicil, or any part thereof which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

23. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

24. And be it further enacted, That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

25. And be it further enacted, That unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

26. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

27. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.⁽⁵⁰⁾

28. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

29. And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or

⁽⁴⁹⁾ See in the matter of the will of Michael Cotton, deceased, 2, S.C.R., 123.

⁽⁵⁰⁾ In *Maddock and others v. Barnett*, S. M. H., March 24, 1877, it was held that a gift of the rents and profits of land was tantamount to a gift of the land itself.

any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise: Provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue, who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

without leaving issue" or "have no issue" shall be construed.

30. And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication. ⁽⁵¹⁾

No devise to trustees or executors except &c., shall pass a chattel interest.

31. And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied. ⁽⁵²⁾

Trustees under an unlimited devise, &c., to take the fee

32. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail, or an estate in *quasi* entail, shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Devises of estates tail shall not lapse.

33. And be it further enacted, That where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

34. And be it further enacted, That this Act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

To what wills and estates this Act shall not extend.

35. And be it further enacted, That this Act shall not extend to Scotland.

Not to Scotland.

36. And be it enacted, That this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present Session of Parliament.

Act may be amended.

17 Vic. No. 5. An Act to amend the Law with respect to the Execution of Wills. [Assented to, 4th July, 1853.]

WHEREAS the law with respect to the execution of Wills requires further amendment: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, as follows:—

1. Where by an Act passed in the first year of the reign of Her Majesty Queen Victoria, intituled, "*An Act for the amendment of the Laws with respect to Wills*" (which said Act was adopted in New South Wales by an Act of Council passed in the third year of the same reign, numbered five), it is enacted, That no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the

1 Vict., c. 23.

When signature to a will shall be deemed valid.

⁽⁵¹⁾ These provisions appear to apply to estates given to trustees by implication, as well as to estates expressly so given. *Per* Milford, P.J., in *Ritchie v. Price*, 8, S.C.R., Eq., p. 14.

signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

Act to extend to
certain wills
already made.

2. The provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered in consequence of the defective execution of such will, or where the property, being other than personalty, has not been possessed or enjoyed by some person claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person than the person claiming under the will in consequence of the defective execution of such will.

Interpretation
clause.

3. This Act shall be read and construed according to the definitions and interpretations contained in the said Act of the first year of the reign of Her Majesty Queen Victoria, and as if this Act had been incorporated with the same and had formed part thereof.

WILLS (NUNCUPATIVE). See *Anne, Statute of*.

APPENDIX.

CHARTER OF JUSTICE—NEW SOUTH WALES.

13th October, 1823.

CHARTER OF
JUSTICE.

GEORGE THE FOURTH, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, To all to whom these presents shall come greeting :

I. Whereas by an Act passed in the fourth year of our reign, intituled "*An Act to provide until the first day of July, eighteen hundred and twenty-seven, and until the end of the next Session of Parliament for the better administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual government thereof, and for other purposes relating thereto,*" it was enacted that it should be lawful for us, our heirs or successors, by Charters or Letters Patent, under the great Seal of our United Kingdom of Great Britain and Ireland, to erect and establish Courts of Judicature in New South Wales and Van Diemen's Land respectively, which should be styled "The Supreme Court of New South Wales," and "The Supreme Court of Van Diemen's Land," and that each of such Courts respectively should be holden by one Judge, or Chief Justice, and should have such ministerial or other officers as should be necessary for the administration of Justice in the said Courts respectively, and for the execution of the judgments, decrees, orders, and process thereof. And it was enacted that the said Judges should, from time to time, be appointed by us, our heirs and successors, and that the said ministerial and other officers of the said Courts respectively, should from time to time be appointed to, and removed from their respective offices, in such manner as we, our heirs and successors, should by such charters or letters patent, as aforesaid, direct; and that the said Judges should be respectively entitled to receive such reasonable salaries as we, our heirs and successors should approve and direct; which salaries should be in lieu of all fees or other emoluments whatsoever: Now know ye, that we, upon full consideration of the premises, and of our especial grace, certain knowledge, and mere motion, have in pursuance of the said Act of Parliament thought fit to grant, direct, ordain, and appoint, and by these presents do accordingly for us, our heirs and successors, grant, direct, ordain, and appoint, that there shall be within that part of our Colony of New South Wales situate in the Island of New Holland, a Court which shall be called "The Supreme Court of New South Wales"; and we do hereby create, direct, and constitute the said Supreme Court of New South Wales a Court of record.

II. And we do further will, ordain, and appoint, that the said Supreme Court of New South Wales shall consist of, and be holden by and before one Judge, who shall be and be called the Chief Justice of the Supreme Court of New South Wales; which Chief Justice shall be a Barrister in England or Ireland of not less than five years' standing, to be named and appointed from time to time, by us, our heirs and successors, by letters patent, under our and their Great Seal of the United Kingdom of Great Britain and Ireland; and such Chief Justice shall hold his office during the pleasure of us, our heirs and successors, and not otherwise.

III. And we do hereby give and grant to our said Chief Justice, rank and precedence above and before all our subjects whomsoever, within the Colony of New South Wales aforesaid, and the islands, territories, and places dependent thereupon, excepting the Governor, or Acting Governor for the time being of the said Colony, and excepting all such persons as by law or usage take place in England before our Chief Justice of our Court of King's Bench.

IV. And we do further grant, ordain, and appoint, that the said Supreme Court of New South Wales shall have and use, as occasion may require, a Seal, bearing a device and impression of our Royal Arms, with an exergue or label surrounding the same, with this inscription "The Seal of the Supreme Court of New South Wales"; and we do hereby grant, ordain, and appoint, that the said Seal shall be delivered to and kept in the custody of the said Chief Justice.

V. And we do further grant, ordain, and declare, that the said Chief Justice, so long as he shall hold his office, shall be entitled to have and receive a salary of two thousand pounds sterling by the year; and our Governor, or Acting Governor, for the time being of the said Colony, is hereby directed and required to cause such salary to be paid to the said Chief Justice by four quarterly payments, at the four most usual days of payment in the year, in bills of exchange, to be drawn by such Governor, or Acting

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Justice.

Governor as aforesaid, on the Lords Commissioners of our Treasury in England, payable to, or to the order of, such Chief Justice; and which bills shall, by our said Governor, or Acting Governor, be accordingly delivered to our said Chief Justice.

VI. And we do further grant, ordain, and declare, that the said salary shall commence and take place in respect to any person who shall be resident in Great Britain or Ireland at the time of his appointment, upon and from the day on which any such person shall thereupon embark or depart from Great Britain or Ireland for New South Wales, to take upon him the execution of the said office; and that the salary of any such Chief Justice who shall, at the time of his appointment, be resident in New South Wales aforesaid, shall commence and take place from and after his taking upon him the execution of such his office, and that such salary shall be in lieu of all fees of office, perquisites, emoluments, and advantages whatsoever; and that no fee of office, perquisite, emolument, or advantage whatsoever, other than and except the said salary, shall be accepted, received, or taken by such Chief Justice, in any manner, or on any account or pretence whatsoever: Provided nevertheless, that it shall be lawful for the said Chief Justice to occupy and inhabit any official house or residence within the said Colony of New South Wales, which hath been, or hereafter may be provided for his residence or occupation, without paying to us, our heirs and successors, any rent for the same, and without being obliged to repair, uphold, or maintain any such house or official residence at his own costs and charges.

VII. And we do further grant, appoint, and declare, that no Chief Justice of the said Supreme Court of New South Wales shall be capable of accepting, taking, or performing, any other office, or place of profit or emolument, on pain that the acceptance of any such other office or place as aforesaid shall be and be deemed in law *de facto* an avoidance of his office of Chief Justice; and the salary thereof shall cease, and be deemed to have ceased accordingly, from the time of such acceptance of any such other office or place.

VIII. And we do hereby constitute and appoint our trusty and well-beloved Francis Forbes, Esquire, to be the first Chief Justice of the said Supreme Court of New South Wales, the said Francis Forbes being a Barrister in England of five years' standing and upwards.

IX. And we do hereby ordain, appoint, and declare, that there shall be and belong to the said Court, the following officers, that is to say, a Registrar, a Prothonotary, a Master, and a Keeper of Records, and such and so many other officers as to the Chief Justice of the said Court for the time being shall, from time to time, appear to be necessary for the administration of Justice, and the due execution of all the powers and authorities which are committed to the said Court by these our letters patent: Provided, nevertheless, that no new office shall be created in the said Court, unless the Governor shall first signify his approbation thereof to our said Chief Justice for the time being, in writing under the hand of such Governor, or acting Governor, as aforesaid; And we do further ordain and direct, that all persons who shall be appointed to the several offices of Master, Registrar, Prothonotary, or Keeper of Records of the said Supreme Court of New South Wales (or to any offices in the said Court, whereof the duties shall correspond to those performed by the Master, Registrar, Prothonotary, or Keeper of Records of any or either of our Courts of Record at Westminster), shall be so appointed by us, our heirs and successors, by Warrant under our or their Royal Sign Manual; and that all persons who shall be appointed to any other office within the said Supreme Court of New South Wales shall be so appointed by the Chief Justice for the time being of the said Court; And we do further direct and appoint, that the several officers of the said Court, so to be appointed as aforesaid by us, our heirs and successors, shall hold their respective offices during our and their pleasure; and that the several officers of the said Court, so to be appointed as aforesaid by the Chief Justice thereof, be subject to be removed by the said Court from their offices therein upon reasonable cause.

X. And we do hereby authorize and empower the said Supreme Court of New South Wales to approve, admit, and enrol such and so many persons, having been admitted Barristers-at-Law or Advocates in Great Britain or Ireland, or having been admitted Writers, Attorneys, or Solicitors, in one of our Courts at Westminster, Dublin, or Edinburgh, or having been admitted as Proctors in any Ecclesiastical Court in England, to act as well in the character of Barristers and Advocates, as of Proctors, Attorneys, and Solicitors in the said Court; and which persons, so approved, admitted, and enrolled, as aforesaid, shall be, and are hereby authorized to appear, and plead, and act for the suitors of the said Court, subject always to be removed by the said Court from their station therein, upon reasonable cause. And we do declare, that no other person or persons whatsoever shall be allowed to appear and plead, or act in the said Supreme Court of New South Wales for or on behalf of such suitors, or any of them: Provided always, and we ordain and declare, that in case there shall not be a sufficient number of such Barristers-at-Law, Advocates, Writers, Attorneys, Solicitors, and Proctors, within the said Colony, competent and willing to appear and act for the suitors of the said Court, then and in that case the said Supreme Court of New South Wales shall and is hereby authorized to

admit so many other fit and proper persons to appear and act as Barristers, Advocates, ^{Charter of Justice.} Proctors, Attorneys, and Solicitors, as may be necessary, according to such general rules and qualifications as the said Court shall for that purpose make and establish : Provided that the said Court shall not admit any person to act in any or either of the characters aforesaid, who hath been, by due course of law, convicted of any crime which, according to any law now in force in England, would disqualify him from appearing and acting in any of our Courts of Record at Westminster.

XI. And we do ordain and declare, that the Governor or Acting Governor for the time being of the said Colony of New South Wales, shall yearly, on the first Monday in the month of January in each year, by warrant under his hand and seal, nominate and appoint some fit and proper person to act as and be the Sheriff of our said Colony of New South Wales and its Dependencies, (other than and except the Island of Van Diemen's Land), for the year ensuing ; which Sheriff, when appointed, shall, as soon as conveniently may be, and before he shall enter upon his said office, take an oath faithfully to execute his office, and the Oath of Allegiance, before the Governor or Acting Governor, who are hereby authorized to administer the same—and such Sheriff shall continue in such his office during the space of one whole year, to be computed from the said first Monday in the month of January, and until another shall be appointed and sworn into the said office ; and in case such Sheriff shall die in his office, or depart from our said Colony of New South Wales, then another person shall, as soon as conveniently may be, after the death or departure of such Sheriff, be in like manner appointed and sworn in as aforesaid, and shall continue in his office for the remainder of the year, and until another Sheriff shall be duly appointed and sworn into the said office. And we do further order, direct, and appoint, that the said Sheriff and his successors shall, by themselves or their sufficient deputies (to be by them appointed and duly authorized under their respective hands and seals, and for whom he and they shall be responsible during his or their continuance in such office) execute, and the said Sheriff and his said deputies are hereby authorized to execute all the Writs, Summonses, Rules, Orders, Warrants, Commands, and Process of the said Supreme Court of New South Wales, and make return of the same, together with the manner of the execution thereof, to the Supreme Court of New South Wales ; and to receive and detain in prison all such persons as shall be committed to the custody of such Sheriff by the said Supreme Court of New South Wales or by the Chief Justice of the said Court. And we do further authorize our Governor or acting Governor for the time being for the said Colony of New South Wales, to reappoint the said person to fill the office of Sheriff from year to year, if it shall appear to our said Governor or Acting Governor expedient so to do. So nevertheless that such appointment shall be annually renewed, and be not ever made for more than one year : Provided nevertheless and we do hereby require our said Governor or Acting Governor of our said Colony in the selection of any person or persons to fill the said office of Sheriff of New South Wales, to conform himself to such directions as may from time to time be given in that behalf by us, our heirs and successors, through one of our or their principal Secretaries of State.

XII. And we do further direct, ordain, and appoint, that whenever the said Court shall direct or award any process against the said Sheriff, (or award any process in any cause, matter, or thing, wherein the said Sheriff, on account of his being related to the parties, or any of them, or by reason of any good cause of challenge which would be allowed against any Sheriff in England, cannot, or ought not by law, to execute the same) ; in every such case the said Supreme Court of New South Wales shall name and appoint some other fit person to execute and return the same ; and the said process shall be directed to the person so to be named for that purpose ; and the cause of such special proceedings shall be suggested, and entered on the records of the said Court.

XIII. Provided always, and we do hereby ordain and declare, that the said Supreme Court shall fix certain limits, beyond which the said Sheriff shall not be compelled or compellable to go in person, or by his officers or deputies for the execution of any process of the said Court, and when the process of the Court shall be to be executed in any place or places beyond the limits so to be fixed, we grant, ordain, and direct, that the said Supreme Court of New South Wales shall, upon motion direct by what person or persons, and in what manner, such process shall be executed ; and the terms and conditions which the party, at whose instance the same shall be issued, shall enter into in order to prevent any improper use or abuse of the process of the said Court. And the said Sheriff shall, and he is hereby required to grant his special warrant, or deputation to such person or persons as the said Court shall direct, for the execution of such process ; And, in that case, we direct and declare, that the said Sheriff, his executors or administrators, shall not be responsible or liable for any act to be done in, or in any way respecting the execution of such process, under and by virtue of such special warrant ; And that any person or persons being aggrieved under, or by pretence of such special warrant, shall and may seek their remedy under any security, which may have been directed to be taken upon the occasion, and which the said Court is hereby authorized to direct to be taken.

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XIV. And whereas in the said Act of Parliament it is enacted that the said Courts shall have cognizance of all pleas, civil, criminal, or mixed; and the jurisdiction of the said Courts, in all such cases, is thereby settled and ascertained; and it is thereby enacted, that the said Courts shall be Courts of ecclesiastical jurisdiction, and shall have full power and authority to administer and execute, within New South Wales and Van Diemen's Land, and the dependencies thereof, such ecclesiastical jurisdiction and authority as shall be committed to the said Supreme Courts, by our charters or letters patent: Now we do hereby, for us, our heirs and successors, grant, ordain, establish, and appoint, that the said Supreme Court of New South Wales shall be a Court of ecclesiastical jurisdiction, with full power to grant probates, under the seal of the said Court, of the last wills or testaments of all or any of the inhabitants of that part of the said colony and its dependencies, situate in the island of New Holland, and of all other persons who shall die and leave personal effects within that part of the said colony; and to commit letters of administration, under the seal of the said Court, of the goods, chattels, credits, and all other effects whatsoever, of the persons aforesaid who shall die intestate, or who shall not have named an executor resident within that part of the said Colony and its dependencies, or where the executor being duly cited, shall not appear and sue forth such probate, annexing the will to the said letters of administration, when such persons shall have left a will without naming any executor, or any person for executor, who shall then be alive and resident within that part of the said Colony and its dependencies, and who, being duly cited thereunto, will not appear and sue forth a probate thereof, and to sequester the goods and chattels, credits and other effects whatsoever of such persons so dying, in cases allowed by law, as the same is and may now be used in the diocese of London; and to demand, require, take, hear, examine, and allow, and, if occasion require, to disallow and reject the accounts of them in such manner and form as is now used, or may be used in the said diocese of London, and to do all things whatsoever needful and necessary in that behalf: Provided always and we do hereby authorize and require the said Court in such cases as aforesaid, where letters of administration shall be committed with the will annexed, for want of an executor applying in due time to sue forth the probate, to reserve in such letters of administration full power and authority to revoke the same, and to grant probate of the said will to such executor whenever he shall duly appear and sue forth the same: And we do hereby further authorize and require the said Supreme Court of New South Wales to grant and commit such letters of administration to any one or more of the lawful next of kin of such person so dying as aforesaid, and being then resident within the jurisdiction of the said Court and being of the age of twenty-one years; and in case no such person shall then be residing within the jurisdiction of the said Court, or being duly cited shall not appear and pray the same, to the Registrar of the said Court, or to such person or persons whether creditor or creditors or not, of the deceased person, as the Court shall see fit: Provided always, that probates of wills, and letters of administration, to be granted by the said Court, shall be limited to such money, goods, chattels, and effects as the deceased person shall be entitled to within that part of the said Colony within the island of New Holland. ⁽³²⁾

XV. And we do hereby further enjoin and require, that every person to whom such letters of administration shall be committed, shall, before the granting thereof, give sufficient security by bond, to be entered into to us, our heirs and successors, for the payment of, a competent sum of money, with one, two, or more able sureties, respect being had to the sum therein to be contained, and in the ability of the sureties, to the value of the estates, credits, and effects of the deceased; which bond shall be deposited in the said Court, among the records thereof, and there safely kept, and a copy thereof shall also be recorded among the proceedings of the said Court, and the condition of the said bond shall be to the following effect:—"That if the above-bounden administrator of the goods, chattels, and effects, of the deceased do make, or cause to be made, a true and perfect inventory of all and singular the goods, credits, and effects, of the said deceased, which have or shall come to the hands, possession, or knowledge of him, the said administrator, or to the hands or possession of any other person or persons for him; and the same so made do exhibit or cause to be exhibited into the said Supreme Court of New South Wales, at or before a day therein to be specified, and the same goods, chattels, credits, and effects, and all other the goods, chattels, credits, and effects, of the deceased, at the time of his death, or which at any time afterwards, shall come to the hands or possession of such administrator, or to the hands or possession of any other person or persons for him, shall well and truly administer according to law; and further shall make or cause to be made, a true and just account of his said administration, at or before a time therein to be specified, and afterwards from time to time as he, she, or they, shall be lawfully required. And all the rest and residue of the said goods, chattels, credits,

⁽³²⁾ Under the Charter the Court can order land made distributable as personally by the Real Estate of Intestates Distribution Act, 26 Vic. No. 20, to be disposed of to the person entitled under that Act. *In the matter of H. Carrell, deceased*, 8, S.C.R., p. 354.

and effects which shall be found, from time to time, remaining upon the said administration accounts, the same being first examined and allowed of by the said Supreme Court of New South Wales, shall, and do pay and dispose of in a due course of administration, or in such manner as the said Court shall direct: Then this obligation to be void and of none effect, or else to be and remain in full force and virtue."

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XVI. And in case it shall be necessary to put the said bond in suit, for the sake of obtaining the effect thereof, for the benefit of such person or persons as shall appear to the said Court to be interested therein, such person or persons, from time to time giving satisfactory security for paying all such costs as shall arise from the said suit, or any part thereof, such person or persons shall, by order of the said Court, be allowed to sue the same in the name of the Attorney General, for the time being of the said Colony; and the said bond shall not be sued in any other manner. And we do hereby authorize and empower the said Court to order that the said bond shall be put in suit in the name of the said Attorney General.

XVII. And we do further will, order, and require, that the said Court shall fix certain periods, when all persons to whom probates of wills and letters of administration shall be granted by the said Court, shall, from time to time, until the effects of the deceased person shall be fully administered, pass their accounts relating thereto before the said Court; and in case the effects of the deceased shall not be fully administered within the time for that purpose to be fixed by the said Court, then or at any earlier time, if the said Court shall see fit so to direct, the person or persons to whom such probate or administration shall be granted, shall pay, deposit, and dispose of the balance of the money, belonging to the estate of the deceased, then in his or their hands; and all money which shall afterwards come into his, her, or their hands, and also all precious stones, jewels, bonds, bills, and securities, belonging to the estate of the deceased, in such manner, and unto such persons, as the said Court shall direct, for safe custody. And we require that the said Court shall, from time to time, make such order as shall be just, for the due administration of such assets, and for the payment or remittance thereof, or any part thereof, as creditors, legatees, or next of kin, or by any other right or title whatsoever. And we further order and direct, that it shall be lawful for the said Court to allow to any executor or administrator of the effects of any deceased person (except as herein mentioned), such commission or percentage out of their assets, as shall be just and reasonable, for their pains and trouble therein: Provided always, that no allowance whatever shall be made for the pains and trouble of any executor or administrator who shall neglect to pass his accounts at such time, or to dispose of any money, goods, chattels, or securities, with which he shall be chargeable, in such manner, as in pursuance of any general or special rule or order of the said Court, shall be requisite. And moreover, every such executor or administrator, so neglecting to pass his accounts, or to dispose of any such money, goods, chattels, or securities, with which he shall be chargeable, shall be charged with interest at the rate then current within the said colony and its dependencies, for such sum and sums of money as, from time to time, shall have been in his hands, whether he shall or shall not make interest thereof.

XVIII. And we do hereby authorize the said Supreme Court of New South Wales, to appoint guardians and keepers of infants and their estates, according to the order and course observed in that part of our United Kingdom called England; and also guardians and keepers of the persons and estates of natural fools, and of such as are or shall be deprived of their understanding or reason by the act of God, so as to be unable to govern themselves and their estates; which we hereby authorize and empower the said Court to inquire, hear, and determine, by inspection of the person, or such other ways and means by which the truth may be best discovered and known.

XIX. And whereas it is by the said Act enacted, "that it shall and may be lawful for us, by our said charters or letters-patent respectively, to allow any person or persons, feeling aggrieved by any judgment, decree, order, or sentence of the Court of Appeals of the Colony of New South Wales, to appeal therefrom to us in our Privy Council, in such manner, within such time, and under and subject to such rules, regulations, and limitations, as we, by any such charters or letters-patent respectively, should appoint and prescribe:" Now we do hereby direct, establish, and ordain, that any person or persons may appeal to us, our heirs, and successors, in our or their Privy Council, in such manner, within such time, and under and subject to such rules, regulations, and limitations as are hereinafter mentioned; that is to say, in case any such judgment, decree, order, or sentence shall be given or pronounced for, or in respect of, any sum or matter at issue, above the amount or value of two thousand pounds sterling; or in case such judgment, decree, order, or sentence, shall involve, directly or indirectly, any claim, demand, or question, to or respecting property, or any civil right, amounting to, or of the value of two thousand pounds sterling, or in case the said Court of Appeals should, by any such judgment, decree, order, or sentence, reverse, alter, or vary any judgment, decree, order, or sentence, of the said Supreme Court of New South Wales, the person or persons feeling aggrieved by any such judgment, decree, order, or sentence, of the said Court of Appeals, may, within fourteen days next after the same shall have been pronounced,

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made, or given, apply to the said Court of Appeals, by petition, for leave to appeal therefrom to us, our heirs and successors, in our or their Privy Council; and in case such leave to appeal shall be prayed by the party or parties who is or are directed to pay any sum of money, or perform any duty, the said Court of Appeals shall, and is hereby empowered either to direct that the judgment, decree, order, or sentence, appealed from shall be carried into execution, or that the execution thereof shall be suspended, pending the said appeal, as to the said Court may appear to be most consistent with real and substantial justice; and in case the said Court of Appeal shall direct such judgment, decree, order, or sentence, to be carried into execution, the person or persons in whose favour the same shall be given, shall, before the execution thereof, enter into good and sufficient security, to be approved by the said Court of Appeals, for the due performance of such judgment or order as we, our heirs and successors, shall think fit to make thereupon; or in case the said Court of Appeals shall direct the execution of any such judgment, decree, order, or sentence, to be suspended, pending the appeal, the person or persons against whom the same shall have been given shall, in like manner, and before any order for the suspension of any such execution is made, enter into good and sufficient security to the said Court of Appeals for the due performance of such judgment or order, as we, our heirs or successors, shall think fit to make thereupon; and in all cases, we will and require, that security shall also be given by the party or parties appellant, to the satisfaction of the said Court of Appeals, for the prosecution of the appeal, and for the payment of all such costs as may be awarded by us, our heirs and successors, to the party or parties respondent; and if such last-mentioned security shall be entered into within three months of the date of such petition for leave to appeal, then, and not otherwise, the said Court of Appeals shall allow the appeal, and the party or parties appellant shall be at liberty to prefer and prosecute his, her, or their appeal to us, our heirs and successors, in our or their Privy Council, in such manner, and under such rules, as are observed in appeals made to us from our plantations or colonies.

XX. And we do hereby reserve to ourself, our heirs, and successors in our or their Privy Council, full power and authority, upon the humble petition at any time of any person or persons aggrieved by any judgment or determination of the said Court of Appeals, to refuse or admit his, her, or their appeal therefrom, upon such terms, and upon such limitations, restrictions, and regulations, as we or they shall think fit; and to reverse, correct, or vary, such judgment or determination as to us, or them, shall seem meet.

XXI. And it is our further will and pleasure, that in all cases of appeal, allowed by the said Court of Appeals, or by us, our heirs or successors, the said Court of Appeals shall certify and transmit to us, our heirs or successors, in our or their Privy Council, a true and exact copy of all evidence, proceedings, judgments, decrees, and orders, had or made in such causes appealed from, so far as the same have relation to the matter of appeal. Such copies to be certified under the seal of the said Court.

XXII. And we do further direct and ordain that the said Supreme Court of New South Wales shall, in all cases of appeal to us, our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as we shall think fit to make in the premises, in such manner as any original judgment, decree or decretal order, or other order or rule by the said Supreme Court of New South Wales should or might have been executed.

XXIII. And we do hereby strictly charge and command all governors, commanders, magistrates, ministers, civil and military, and all our liege subjects within and belonging to the said colony, that in the execution of the several powers, jurisdictions and authorities hereby granted, made, given, or created, they be aiding and assisting and obedient in all things as they will answer the contrary at their peril.

XXIV. Provided always, that nothing in these presents contained, or any act which shall be done under the authority thereof, shall extend, or be construed to extend, to prevent us, our heirs and successors, to repeal these presents, or any part thereof, or to make such further or other provision by letters-patent for the administration of justice, civil and criminal, within the said colony, and the places now or at any time hereafter to be annexed thereto, as to us, our heirs and successors, shall seem fit, in as full and ample a manner as if these presents had not been made; these presents or anything herein contained to the contrary thereof, in anywise notwithstanding.

In witness ourself at Westminster, the 13th day of October, in the fourth year of our reign.

“ELDON.”

By writ of Privy Seal examined with the Record in the Petty Bag Office in the Court of Chancery the 22nd day of April, 1834.

J. BENTALL.

COLONIAL LAWS (VALIDATION).

28 & 29 Vict. c. 63. An Act to remove doubts as to the Validity of Colonial Laws. [29th June, 1865.]

"Whereas doubts have been entertained respecting the validity of divers laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the powers of such Legislatures, and it is expedient that such doubts should be removed:" Be it enacted as follows:

1. The term "Colony" shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a Legislature, as hereinafter defined, except the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty under or by virtue of any Act of Parliament for the government of India:

Definitions:
"Colony."

The terms "Legislature" and "Colonial Legislature" shall severally signify the authority, other than the Imperial Parliament, or Her Majesty in Council, competent to make laws for any Colony:

"Legislature,"
"Colonial Legislature."

The term "Representative Legislature" shall signify any Colonial Legislature which shall comprise a legislative body of which one half are elected by inhabitants of the Colony:

"Representative
Legislature."

The term "colonial law" shall include laws made for any Colony either by such Legislature as aforesaid or by Her Majesty in Council:

"Colonial law."

An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express words or necessary intendment of any Act of Parliament:

Act of Parliament,
&c., to extend to
Colony when made
applicable to such
Colony:

The term "Governor" shall mean the officer lawfully administering the Government of any Colony:

"Governor."

The term "letters-patent" shall mean letters-patent under the great seal of the United Kingdom of Great Britain and Ireland.

"Letters-patent."

2. Any Colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read, subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Colonial law
when void for
repugnancy.

3. No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.

Colonial law
when not void
for repugnancy.

4. No colonial law, passed with the concurrence of or assented to by the Governor of any Colony, or to be hereafter so passed or assented to, shall be, or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof which may have been given to such Governor by or on behalf of Her Majesty by any instrument other than the letters patent or instrument authorizing such Governor to concur in passing or to assent to laws for the peace, order, and good government of such Colony, even though such instructions may be referred to in such letters patent or last-mentioned instrument.

Colonial law not
void for incon-
sistency with
instructions.

5. Every colonial Legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative Legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in Council, or colonial law for the time being in force in the said Colony.

Colonial Legis-
lature may estab-
lish, &c., Courts
of law.

Representative
Legislature may
alter constitu-
tion.

6. The certificate of the Clerk or other proper officer of a legislative body in any Colony to the effect that the document to which it is attached is a true copy of any colonial law, assented to by the Governor of such Colony, or of any Bill reserved for the signification of Her Majesty's pleasure by the said Governor, shall be *prima facie* evidence that the document so certified is a true copy of such law or bill, and, as the case may be, that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the Governor; and any proclamation purporting to be published by authority of the Governor in any newspaper in the Colony to which such law or bill shall relate, and signifying her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved bill as aforesaid, shall be *prima facie* evidence of such disallowance or assent.

Certified copies
of laws to be
evidence that
they are properly
passed.

Proclamation to
be evidence of
assent and dis-
allowance.

CROWN LANDS ALIENATION ACTS.

25 Vic. No. 1. An Act for regulating the Alienation of Crown Lands.
[18th October, 1861.]

Preamble.

WHEREAS it is expedient to make better provision for the alienation of Crown Lands: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales, in Parliament assembled, and by the authority of the same as follows:—

Interpretation.

1. The following terms within inverted commas shall for the purposes of this Act, unless the context otherwise indicate, bear the meanings set against them respectively:—

"Crown Lands"—All lands vested in Her Majesty which have not been dedicated to any public purpose, or which have not been granted or lawfully contracted to be granted in fee simple.

"Town Lands"—Crown Lands in any city, town, or village, or set apart as a site for the same.

"Suburban Lands"—Crown Lands declared in the *Gazette* to be suburban by the Governor and Executive Council.

"First Class Settled Districts"—Lands declared to be of the Settled Class by the Queen's Orders in Council.

"Second Class Settled Districts"—Lands converted into the Settled Class by the Act twenty-three Victoria number four, or that may be hereafter so converted under the "Crown Lands Occupation Act of 1861."

"Orders in Council"—The Orders in Council and Regulations from time to time issued under the Imperial Act fifth and sixth Victoria chapter thirty-six and ninth and tenth Victoria chapter one hundred and four.

"Minister"—The Minister for the time being charged with the administration of the Public Lands.

"Land Agent"—Any person duly appointed to sell Crown Lands.

"Land Office Days"—Days notified in the *Gazette* upon which land agents shall attend at the land offices of their districts respectively.

"Appraisement"—Settlement of price, value, or damage, by appraisers appointed in manner prescribed by this Act.

"Arbitration"—Settlement of boundaries by arbitrators appointed in manner prescribed by this Act.

"Improvements"—Improvements on Crown Lands, or lands conditionally sold to the value, to be determined by appraisement if disputed in town and suburban lands of not less than twice the upset price of the allotment or portion on which the improvements may stand, and in other lands of not less than the unimproved value of the lands to be in like manner determined, not being less than one pound per acre.

"Frontage"—Frontage to any road, river, stream, or watercourse which, according to the practice of the Survey Department, ought to form a boundary between different sections or lots of land.

Repeal of Orders in Council, &c.

2. On and after the passing of this Act the Orders in Council shall be repealed: Provided that nothing herein shall prejudice or affect anything already lawfully done or commenced, or contracted to be done thereunder respectively, or to prevent the several provisions of the said Orders in Council from being carried into effect with respect to lands under lease or promise of lease made previously to the twenty-second day of February one thousand eight hundred and fifty-eight, during the currency of such leases as fully as if the same had not been hereby repealed.

Alienation of Crown Lands.

3. Any Crown Lands may lawfully be granted in fee simple or dedicated to any public purpose under and subject to the provisions of this Act, but not otherwise: And the Governor, with the advice of the Executive Council is hereby authorized in the name and on the behalf of Her Majesty so to grant or dedicate any Crown Lands.

Publication of notice of sites of cities, towns, suburban lands, reserves, &c.

4. The Governor, with the advice of the Executive Council, may by notice in the *Gazette*, declare what portions of Crown Lands shall be set apart as the sites of new cities, towns, or villages, and define the limits of the suburban lands to be attached thereto, and to any existing city, town, or village, and also the portions of town lands or suburban lands, to be dedicated to public purposes, and what lands shall be reserved from sale until surveyed for the preservation of water supply or other public purpose: And upon any such notice being published in the *Gazette* such lands shall become and be set apart, attached, dedicated, or reserved accordingly: Provided that within one month, should Parliament be then in Session, and otherwise within one month after the commencement of the next ensuing Session of Parliament, there shall be laid before both Houses of Parliament an abstract of all such declarations.

Dedication of Crown lands to public purposes.

5. The Governor, with the advice aforesaid, may by notice in the *Gazette* reserve or dedicate in such manner as may seem best for the public interest, any Crown lands for any railway or railway station; any public road, canal, or other internal communication;

any public quay or landing-place; any public reservoir, aqueduct, or watercourse; or for the preservation of water supply; or for any purpose of defence; or as the site for any place of public worship, any hospital, asylum, or infirmary, any public market or slaughter-house, any college, school, mechanics' institute, public library, museum, or other institution for public instruction or amusement; or for any pasturage common; or for public health, recreation, convenience, or enjoyment; or for the interment of the dead; or for any other public purpose. And upon any such notice being published in the *Gazette* such lands shall become and be reserved or dedicated accordingly, and may at any time thereafter be granted for such purposes in fee simple: Provided that an abstract of any intended reservation or dedication shall be laid before both Houses of Parliament one calendar month before such reservation or dedication is made.

Abstract to be laid before Parliament.

6. After any land shall have been temporarily reserved from sale, the same shall not be sold or otherwise disposed of until such reservation shall be revoked by the Governor with the advice aforesaid, and the notice of such revocation published in the *Gazette*. And all lands which have hitherto been or shall hereafter be permanently reserved for any of the purposes aforesaid shall be deemed to be set apart, attached, and dedicated accordingly, and every conveyance and alienation thereof except for the purpose for which such reservation shall have been made shall be absolutely void, as well against Her Majesty as all other persons whomsoever.

Temporary reservations.

Permanent reservations.

7. Crown lands held under lease or promise of lease issued or made previously to the twenty-second day of February, one thousand eight hundred and fifty-eight, shall during the currency of such lease be exempt from sale under this Act, unless where such lands have been lawfully withdrawn from the holding of the lessee in accordance with the Orders in Council or may hereafter be lawfully withdrawn from such holding: Provided that the lessee may be permitted to exercise a pre-emptive right of purchase over one portion and no more of an area not exceeding six hundred and forty acres out of each block of twenty-five square miles, and at a value to be determined by appraisalment not being less than one pound per acre: Provided, nevertheless, that any land purchased under the Orders in Council previously to the passing of this Act shall be estimated in the six hundred and forty acres aforesaid: And provided that such appraisalment shall not include any value for improvements: And provided that every application for the purchase of land under these conditions shall be advertised in the *Government Gazette* for the period of one calendar month before the sale is completed.

Exception from sale of certain lands.

Limitation of pre-emptive right of purchase.

8. (*) Upon application made within twelve months after the passing of this Act by any person or his alienee who may prior thereto have made improvements on any Crown lands or upon application within twelve months after the notification in the *Gazette* of any reserve from lease or promise of lease under the Orders in Council within which improvements may be situated or upon application by the holder of any lease or promise of lease of Crown Lands containing improvements made previously to the expiration of such lease or upon application by the improver or his alienee made at any period for the sale of improved lands in proclaimed Gold Fields the Governor may with the like advice sell and grant such lands to the owner of such improvements without competition in fee simple at a price to be fixed by appraisalment not being less than the minimum upset price of the class of land as set forth in section twenty-three of this Act and in no case less than one pound per acre but such appraisalment shall not include any value for improvements. Provided that nothing herein contained shall be held to require the sale of any land which may contain auriferous deposits. Provided also that such sales shall be made in accordance with the general subdivision of the land whether town suburban or other lands and shall embrace only allotments or portions on which improvements may stand and that the area shall not for each improvement exceed half an acre for town land two acres for suburban land and land on Gold Fields and three hundred and twenty acres for other lands.

Sales in consideration of improvements.

9. The Governor with the like advice may authorize any proprietor of land having frontage to any harbour or river, to fill in and reclaim any land adjoining thereto and lying beyond or below high-water-mark, or to erect a wharf or jetty upon or over the land the same; and on payment of an adequate money consideration to be determined by appraisalment for the unimproved value of the land, such land or any land which may already have been reclaimed shall become vested in fee simple in such proprietor, and may be granted to him accordingly: Provided always that no such reclamation shall be authorized which shall be calculated in any way to interrupt or interfere with the navigation of such harbour or river, or with the rights or interests of adjoining proprietors; and provided also that the intention to grant such land shall have been previously announced in the *Gazette* for four consecutive weeks before such land is granted in fee simple. (33)

Reclamation of lands by proprietor of adjoining lands.

Not to interfere with navigation nor with adjoining proprietors.

(*) Repealed by the "Lands Acts Amendment Act of 1875," 39 Vic. No. 13.

(33) A grant by the Crown of the fee simple of portion of the harbour within the flow of the tide, issued under the 9th section of the "Crown Lands Alienation Act of 1861," has not *per se* the effect of causing such portion to cease being part of the harbour;

Closing and
alienation of
unnecessary
roads.

10. Whenever the owner or owners of any lands adjoining a road which has been reserved for access to such lands only and is not otherwise required for public use or convenience shall make application to the Minister to close such road, or whenever any road which shall have been proclaimed through any land shall have rendered unnecessary a reserved or other road bounding or traversing such or neighbouring land, it shall be lawful for the Governor with the advice aforesaid to notify in the *Gazette* and in the local newspapers, if any, that such reserved or boundary road will be closed; and at any period, not less than three months after the first publication of such notice, a grant or grants of the site of the road so closed may issue to the owner or owners of adjoining lands, in fair proportion or in accordance with agreement among such owners: Provided that an adequate money consideration to be determined by appraisalment shall be paid for the same.

Sales without
competition in
special cases.

11. In cases in which no way of access to any portion of Crown Land may exist or may be attainable, or in which any such portion may be insufficient in area for sale, conditional or by auction or in which a portion of Crown Land may lie between land already granted and a street or road which forms or should form the way of approach to such granted land or in which buildings erected on lands already granted may have extended over Crown Land, or in any cases of a like kind, the Governor may with the advice aforesaid, sell and grant such lands to the holder or holders of adjacent lands without competition, and at a price to be determined by appraisalment being not less than the minimum upset price per acre of the class of land as set forth in section twenty-three of this Act.

Rescission of
reservation of
water frontage.

12. The Governor may with the like advice rescind any reservation of water frontage on the sea coast or any bay, inlet, harbour, or navigable river, or land adjoining such frontage contained in any Crown grant, either wholly or to such extent and subject to such conditions or restrictions as shall be deemed advisable, and the land being the subject of such rescission shall on payment of an adequate money consideration to be determined by appraisalment, being not less than the minimum upset price per acre of the class of land as set forth in section twenty-three of this Act, be granted to the owner of the land conveyed in the original Crown grant accordingly: Provided that nothing in this clause contained shall empower the Governor to grant any land below high-water-mark, or to interfere with any land used as a public thoroughfare, or with any land set apart and dedicated for any public purpose: Provided also, that for four consecutive weeks notice shall be given in the *Gazette* previous to issuing such grant.

Conditional sale
of unimproved
lands without
competition.
(*) (f)

13. On and from the first day of January, one thousand eight hundred and sixty-two, Crown lands other than town lands or suburban lands, and not being within a proclaimed Gold Field, nor under lease for mining purposes to any person other than the applicant for purchase, and not being within areas bounded by lines bearing north-east, south, and west, and distant ten miles from the outside boundary of any city or town containing according to the then last Census ten thousand inhabitants, or five miles to the outside boundary of any town containing according to the then last Census five thousand inhabitants, or three miles from the outside boundary of any town containing according to the then last Census one thousand inhabitants, or two miles from the outside boundary of any town or village containing according to the then last Census one hundred inhabitants, and not reserved for the site of any town or village, or for the supply of water, or from sale for any public purpose, and not containing improvements and not excepted from sale under section seven of this Act, shall be open for conditional sale by selection in the manner following, that is to say: Any person may, upon any Land Office day, tender to the Land Agent for the district a written application for the conditional purchase of any such lands not less than forty acres nor more than three hundred and twenty acres, at the price of twenty shillings per acre, and may pay to such Land Agent a deposit of twenty-five per centum of the purchase money thereof: And if no other like application and deposit for the same land be tendered at the same

and until reclamation actually takes place, the public right of navigation, with its incidents of anchorage, grounding, &c., remains over such portion while it is covered with the tidal waters. The lodging upon such ground when dry by the recess of the tide of logs of timber which have been floated or moored upon the waters over it—if such lodging take place as incidental to, or in the course, or as a necessity of navigation—is not a trespass. *Chadwick v. Smith and others*, 9 S. C. R., 196.

(*) See subsection 12 of section 12 of the "Crown Lands Occupation Act of 1861," by which it is enacted that "The sale conditional or otherwise of any portion of [Crown] land under lease, shall cancel so much of the lease as relates to the land so sold and to three times the area thereof adjoining thereto." See also, to the same effect, section 18 of the same Act, now repealed and superseded by section 35 of 39 Vic. No. 13, which see, *post*. See also and consider *Annie Joachim v. O'Shanassy*, *infra*.

(f) By section 31 of the "Mining Act of 1874" (37 Vic. No. 13), races, dams, &c., in or upon lands alienated under this or any other Act relating to the sale, &c., of Crown Lands are protected notwithstanding alienation.

time, such person shall be declared the conditional purchaser thereof, at the price aforesaid: Provided that if more than one such application and deposit for the same land, or any part thereof, shall be tendered at the same time to such Land Agent, he shall, unless all such applications but one be immediately withdrawn, forthwith proceed to determine by lot, in such manner as may be prescribed by regulations made under this Act, which of the applicants shall become the purchaser. ⁽²⁴⁾

⁽²⁴⁾ *Semble* (per Stephen, C.J.), that a conditional purchaser (or free-selector) after payment of purchase money is in possession as equitable owner in fee. *Ex parte Main*, 2, S. C. R., p. 198.

A conditional purchaser of Crown Land under the 13th section of the "Crown Lands Alienation Act of 1861," the same not having been contracted to be granted in fee to any other party, and not being excepted from sale under the 7th section, nor containing improvements, or being within any other of the excepted cases specified in the section, is by force of that statute the owner of the land for the time being; and so long as the conditions continue to be fulfilled, no other person can by law be deemed such owner. A conditional purchaser of Crown Land under the 13th section of the Crown Lands Alienation Act, is a "holder in fee simple" of his land within the fifth paragraph of the 12th section of the Crown Lands Occupation Act, and is entitled to the right of leasing the adjacent land conferred by the 12th section. The sale conditional of land under a pre-emptive lease to a conditional purchaser, takes away from his pre-emptive lease only the land sold and not also three times its area. Until grant issued, the estate of a conditional purchaser of Crown Land, under the 13th section of the Crown Lands Alienation Act, cannot be separated into legal and equitable fee, but is a statutory fee simple conditional, with a statutory right of possession, and capable of becoming a fee simple unconditional at the end of three years (per Hargrave, J.). A conditional purchaser of Crown Land, under the 13th section of the Crown Lands Alienation Act, has a statutory right to hold his land so long as he continues to perform the conditions required by the Act, and this right commences from the moment he is declared such purchaser and has taken possession, and subject to the performance of the conditions is absolute and indefeasible against all the world including the Crown; and a grant of the land in possession of such conditional purchaser issued by the Crown to any other person is void. *Chisholm v. Macauley*, 7, S. C. R., 312.

The 13th section of the "Crown Lands Alienation Act of 1861" enacts that Crown Lands shall be open for conditional sale by selection. The 1st section of the Act defines Crown Lands to be "all lands vested in Her Majesty, which have not been dedicated to any public purpose, or which have not been granted or lawfully contracted to be granted in fee simple." What is sufficient evidence to establish that land has been lawfully contracted to be granted, so as to prevent it being open for conditional sale by selection? *Mate v. Nugent*, 8, S. C. R., p. 246.

A father applied under the 13th section of the "Crown Lands Alienation Act of 1861" for the conditional purchase of 40 acres of Crown Lands selected by him in the name of his son, an infant of three and a half years of age, and the son was declared the conditional purchaser. *Held* (Stephen, C.J., *dissentiente*), that such selection and purchase were valid. The question, what constitutes "bond fide residence" and "occupation" of conditionally purchased lands under the 18th section of the Act, considered. Also the question, what constitutes "abandonment" of such lands, and how the satisfaction of the Governor and Executive Council as to such abandonment is to be proved, and what course the Government should pursue under the 20th section of the Act in declaring them forfeited, considered. *Drinkwater v. Arthur*, 10, S. C. R., p. 193.

In a suit for a declaration that the respondent was trustee for the appellant of land conditionally purchased by the former, under the "Crown Lands Alienation Act of 1861," with the moneys of the latter, and for a consequent order for conveyance, in accordance with a written agreement whereby the respondent had bound himself to fulfil the statutory conditions of purchase and thereafter to transfer to the appellant; the respondent pleaded that such agreement was illegal, and contrary to the spirit and policy of the said Act, and that, therefore, the appellant was not entitled to the transfer sought. The agreement was as follows:—"Memorandum of agreement between John Muir, of Wolgan, and Edwin Barton, of Wallerawang, made the 5th of August, 1869: I, John Muir, do hereby acknowledge to have received from Edwin Barton the sum of eighty pounds, with which money I have this day purchased for the said Edwin Barton, his heirs, executors, administrators, or assigns, 320 acres of land in Wolgan, adjoining the 1,000 acres grant to the late William Walker, which 320 acres of land are in lots of 40 acres each. And I, John Muir, do for myself, my heirs, executors, administrators, or assigns, hereby agree to fulfil all the conditions of the 'Crown Lands Alienation Act of 1861,' under which Act the said 320 acres of land are conditionally purchased, and at the expiration of three years from this date, or at any earlier date, to transfer all my right, title, and interest in said 320 acres to the said Edwin Barton, his heirs,

Conditional sale
in Gold Fields.

14. Crown Lands within proclaimed Gold Fields, and not within areas excluded by special proclamation, and not occupied for gold-mining purposes, shall be open for conditional sale, subject to all the provisions applicable to sales under the thirteenth section of this Act: Provided that at any period, persons specially authorized by the Minister shall be at liberty to dig and search for gold within the lands selected, and that should the land be found to contain auriferous deposits, it shall be in the power of the Governor and Executive Council to annul the sale, and thereupon the conditional purchaser shall be entitled to compensation for the value, other than auriferous, of the lands and improvements; such value to be determined by appraisalment. (*)

executors, administrators, &c., the said Edwin Barton paying all expenses." *Held* (reversing the decree of the Supreme Court, 10th July, 1873), that there should be a declaration that the legal title of the respondent, as purchaser, was held by him as trustee for the appellant, and a direction that the respondent do proceed to complete the purchase according to the terms thereof, and thereafter to execute a proper conveyance to the appellant. The agreement, admittedly not immoral or against public policy, is not contrary to the terms of the 18th section of said Act, and cannot be annulled or tainted with illegality on any conjectural view of the policy of the Act. *Barton v. Muir*, 6, L. R., P. C. App., 134.

An infant may be a conditional purchaser under the 13th section of the "Crown Lands Alienation Act of 1861," 25 Vic. No. 1. *Drinkwater v. Arthur* (10, S. C. R., 193), *Emery v. Barclay* (8, S. C. R., 389), and accordingly *Joachim v. O'Shanassy* (13, S. C. R., 174). In the last case, plaintiff, a conditional purchaser, sued defendant, a squatter, for trespass. At the trial the Chief Justice told the jury that the substantial question for them was whether the plaintiff occupied within a month from the date of her application. If she did she was entitled to recover; if not, the verdict ought to be for the defendant. *Held* (per Hargrave and Manning, J.J., *dissentiente* Martin, C.J.), that such direction was wrong. *Per* Sir W. Manning, J.: The plaintiff must shew actual possession of the *locus in quo* before the acts of trespass complained of. *Per* Hargrave, J.: The *onus* of proving the breach of any of the conditions is on the trespasser, and the lessee is in no different position from a stranger. *Annie Joachim v. O'Shanassy*, Knox's Term Reports, First Term, 1876, p. 118. The following are the judgments *in extenso*, as reported in *S.M.H.*:—

The Chief Justice said: "This was an action brought by the plaintiff, an infant, by her next friend, William Joachim, her father, against the defendant, for trespasses committed by depasturing sheep upon her land. This land had formed portion of a large squatting run held by the defendant under lease from the Crown. On the 19th February, 1873, William Joachim, professing to act as the agent of his daughter, the plaintiff, lodged in the Crown Lands Office at Moama, in pursuance of the terms of the 13th section of the 'Crown Lands Alienation Act of 1861,' an application for the conditional purchase by her of 320 acres, described as follows:—'County of Cadell, parish of Moama, 320 acres: Commencing at the north-east angle of the block applied for by James Joachim, thence north-easterly along the reserve for railway line 60 chains, thence west about 60 chains 50 links, thence south about 57 chains, and thence east along northern boundary of block applied for by about 47 chains to point of commencement.' Several witnesses were called on behalf of the plaintiff to prove occupation by her within one month after the date of the conditional purchase, as required by the 16th section of the Act. I told the jury that the substantial question for them was, 'Did the plaintiff occupy within the month—that is to say, before the expiration of the 20th March, 1873?' If she did, I said she was entitled to recover—if not, the verdict should be for the defendant. The jury on this direction found a verdict for the defendant, and a rule was subsequently granted calling on the defendant to show cause why such verdict should not be set aside and a new trial granted, on the ground that I erroneously held that the plaintiff, in order to succeed in this action, was bound to prove that she occupied the land within a month from the date of the conditional purchase thereof, and that is the question now to be determined. I am of opinion that my direction to the jury was a correct one. The alienation of 'Crown Lands' in this Colony, such as the lands in question in this case, is regulated entirely by statute. In 1873, when the plaintiff made her conditional purchase, the Act regulating such alienation was the 25 Victoria, No. 1, which Act has been lately amended by the 39 Victoria, No. 13. This latter statute has no bearing upon the present question. In the early days of the Colony, and for a long time afterwards, the Crown, as the owner by the Common Law of all the unalienated lands, made grants *ex mero motu* in such forms and under such conditions as were thought expedient by its advisers or representatives, to encourage the settlement and cultivation of the country. At a later period Acts were passed to put an end to grants of this description, and to provide for the disposal of the Crown Lands by the sale of them by auction. This mode of disposing of them in fee simple remained in operation for several years, until in 1861 the Crown Lands Alienation Act of that year was passed. By that Act the Crown equally with its subjects is bound. The one can grant and the

(*) See section 11 of 37 Vic. No. 13 (Mining Act).

15. Every Land Agent shall duly enter at the time in a book to be provided for the purpose the particulars of every application for conditional purchase, lodged with him under the provisions of sections thirteen and fourteen of this Act, and shall transmit to the proper officer of the Government, on Monday in each week, a true extract therefrom, showing the particulars of all such applications for the week preceding.

others can acquire the fee simple in Crown Lands only in the mode prescribed by that enactment. An owner of land in fee simple may, as everybody knows, convey it with or without consideration to whomsoever he may please; and any one may purchase either in his own name or in the names of his or any other infant children any lands that the owner in fee is willing to sell to him. Thus, a person desiring to advance his children may purchase land in their names, and have such land conveyed to them at once, even though they may be under the age of twenty-one years, as they can take the land under such a conveyance although they cannot convey it away during their minority. A purchase of this kind may be made not only from private individuals, but it may be made at auction from the Crown also. There is nothing to prevent a person attending a sale of Crown Lands, and purchasing, in the name of infants, any lands then offered that he may desire and be able to pay for. But the conditional purchase—popularly termed 'free selection' under the Crown Lands Alienation Act, 25 Vic. No. 1—is a different thing altogether. That mode of alienating public lands came into operation then for the first time. It was, after much difficulty, and many acrimonious and exciting discussions, both in and out of Parliament, adopted by the Legislature, to promote the more rapid and beneficial settlement of the country, by enabling poor people, or people with limited means, to select small portions of Crown Lands of their own motion, on their paying a small sum per acre down, and doing certain things which the statute prescribed. For instance, power was not given to any one to conditionally purchase his 40 or 820 acres of land by paying a deposit of 5s. per acre, and then leaving it unoccupied or unimproved as long as he might think fit. A scheme of that sort would obviously have placed the whole country in the hands of speculating capitalists, and would not have accomplished what the Legislature intended. Accordingly, it was provided that before the expiration of a month from the original purchase or selection the person so purchasing or selecting was to occupy the land, to improve it, and to reside upon it for a certain time. These were the conditions on which this great privilege of 'free selection' was conceded to him, and on which the Crown was authorized to grant him the land. The Crown could not demand from him the performance of other conditions, neither could it dispense with any of the conditions so laid down by the statute. It has, by a very rigid application of the principle that a Court is in general bound by its previous decisions, been held by this Court, that an infant a moment old might under the Act of 1861 by a self-constituted agent select land and occupy it within a month, improve it, and in three years make a declaration that all these things had been done. In reality there was only one Judge of this Court who entertained this view; and yet, curiously enough, that view came to be binding on the Court. The result was thus brought about: In *Emery v. Barclay* (8, S. C. R., p. 380), the Court are reported to have been 'agreed in opinion that a selection might be made by a person under twenty-one years of age, and by a father in the name of his son.' That agreement was arrived at apparently without argument of any kind. The infant in that case was a grown-up lad of sixteen years or more, and habitually an actual worker on the ground. In *Drinkwater v. Arthur* (10, S. C. R., 198), decided in 1871, two years after the former case, a question arose as to the validity of a 'free selection' by a father in the name of his infant child three and half years old. His Honor Mr. Justice Hargrave (p. 219) likened the case to that to which I have above referred, of a father purchasing in the ordinary way in the name of his infant children, between which and such a case as that under consideration, there is, as it appears to me, no point of similarity whatever, and held that the age of the infant made no difference in the power of the father to select in such infant's name. It is plain that in the case of an ordinary purchase by the father in the child's name, it is the father who acts on his own account, and as a principal, having full power independently of any statute to do as he likes with such land as he may buy, while in the case of a 'free-selector,' it is the 'infant' who selects and has to comply with the statutory conditions to enable him to acquire any land at all. His Honor the Chief Justice, Sir Alfred Stephen, while he saw no reason to dissent from the view which he took in *Emery v. Barclay*, said (p. 205) that a selection by a baby, or by a father already a free selector on his own account in the name of that baby, appeared to him to be worse than merely a farce—that it was a fraud upon the statute. Mr. Justice Cheeke (p. 228), referred to the decision in *Emery v. Barclay*, and said *vere it not for that decision* he had no hesitation in saying that *he should certainly concur in the judgment of his Honor the Chief Justice*. Thus, in a Court consisting of three Judges, because two years before without argument the Court said that a grown up lad 16 years of age might 'free select,' Mr. Justice Cheeke concurred with Mr. Justice Hargrave in holding that an infant of any age might so select, although he agreed with the Chief Justice in the opinion

Temporary
boundaries of
land until sur-
veyed by
Government.

16. (*) If at the time of conditional purchase of any Crown land under sections thirteen and fourteen of this Act, such land shall not have been surveyed by the Government, temporary boundaries thereof shall be determined by the conditional purchaser, who shall within one month after such time of purchase occupy the land. And any dispute between such purchaser and any other person, other than a holder in fee or his alienee, claiming any interest therein respecting such boundaries, shall be settled by arbitration: Provided, that if such land shall not be surveyed by the Government within

that such an interpretation of the law was an erroneous one. Thus the matter stood until the case of *John Thomas Joachim v. O'Shanassy* (13, S. C. R., 174), decided by Mr. Justice Hargrave, Mr. Justice Cheeke, and Mr. Justice Fawcett, in 1874. In this case Mr. Justice Cheeke again expressed his concurrence with the views of Sir Alfred Stephen, but held himself bound by the decision in *Emery v. Barclay*, while Mr. Justice Fawcett, without giving any opinion of his own, held himself bound by the decision in *Drinkwater v. Arthur*, but not by *Emery v. Barclay*, which he regarded as no authority on the point in question. Thus the right of a father to select in the name of an infant of any age was again upheld, although again one of the three Judges who so held thought that view to be wrong, and another gave no opinion of his own; so that of the four Judges, Sir Alfred Stephen, Mr. Justice Hargrave, Mr. Justice Cheeke, and Mr. Justice Fawcett, who were concerned in deciding these three cases, one and one only expressed the opinion that an infant from the moment of its birth was capable of making a conditional purchase under the 'Crown Lands Alienation Act of 1861'. This last case was taken to the Privy Council, and that tribunal, as reported in 1, App. Cas., 82, agreed with Mr. Justice Hargrave, and it must now be assumed in this Court that his Honor was right in this matter; although if I may venture to say so with the greatest respect, that judgment as a matter of reasoning apart from authority, would have been more satisfactory if it had not been based so pointedly on a 'course' or 'series of decisions acted upon for several years,' seeing that there had been only three such decisions—the first in 1869, when the point was agreed upon without argument; the second in 1871, when this agreement was erroneously acquiesced in as a binding authority by Mr. Justice Cheeke, who, while so acquiescing, thought it to be wrong; and the third in 1874, when a majority of the Judges were influenced by the authority of the two previous cases, which one of them thought to be wrong, while the other offered no opinion. Those three cases (the last being the one then under appeal) can hardly be called with propriety a 'course' or 'series' of decisions, or be said to be decisions 'acted upon for several years.' Satisfaction with this judgment would, further, not have been diminished, if their Lordships had recognized the fact, that a conditional purchaser takes his land not by means of a grant from the Crown, which the Crown may in its discretion refuse, but by his own unfettered act, by virtue of a statute which entitles him absolutely to a grant if certain conditions are observed by him. I may further remark that it is obvious, that the surmise that many titles may have depended upon the assumption of the power of an infant to 'free select' was of no importance, inasmuch as a late Act, of which their Lordships were aware, confirmed all such titles, and rendered any straining of the law unnecessary to uphold them. This judgment of the Privy Council leaves the present question untouched, and there is no decision of this Court upon it, although it would seem from expressions used on some occasions, that it has been assumed that to make a conditional purchase valid there must be occupation within the month. The Act under which these 'free selections' are made is very badly drawn, and in some instances things instead of being required in so many words to be done, are made necessary only by an implication arising from expressions in which the doing of them is assumed to be required. In construing this, like all other Acts, it is the duty of the Court to ascertain as well as it can the meaning and intention of the Legislature, in order that that intention may be carried out. A careful examination of the Act must, I think, lead to the conclusion that one of the conditions imposed upon a 'free selector' is, that he should occupy his selection within a month. The 13th section authorizes any person on any Land Office day to tender a written application for the conditional purchase of land as therein mentioned. This section contains no direction in reference to the occupation, but in the 16th section it is enacted that if at the time of the conditional purchase the land 'shall not have been surveyed by the Government, temporary boundaries thereof shall be determined by the conditional purchaser, who shall within one month after such time of purchase occupy the land.' There may be some difficulty in saying what a 'temporary boundary' is, and what is meant by this power to 'determine' such a boundary. Probably, looking at the presumed inability of the majority of persons likely to become conditional purchasers, it was thought that however able they might be to give a description of the lengths of the lines which they intended to form the sides of their selections, they would not be able with precision to lay down those lines upon the ground, and that, therefore, they ought to be allowed to mark such lines provisionally, subject to

(*) Repealed by the "Lands Acts Amendment Act of 1875," 39 Vic. No. 13.

twelve months from the date of application, it shall be lawful for the conditional purchaser, by notice in writing to the Land Agent for the district, to withdraw his application, and thereupon he shall be entitled to demand and recover back any deposit paid by him; or the purchaser shall have the option of having the land surveyed by a duly qualified licensed surveyor, and the expense of such survey shall be allowed to such purchaser as part payment of his purchase money, such expense to be allowed in accordance with the scale of charges fixed or to be fixed by the Surveyor General.

correction when the surveyor came to ascertain and fix them. But, however that may be, the direction of the statute is plain, that the conditional purchaser is to occupy the land within a month. If he does not do that, it seems to me that he does not comply with one of the essential conditions on which the right to select was conceded to him. It is true that the 13th section states that if, when he makes his selection by the written application to the Land Office and pays his deposit, 'no other like application and deposit for the same land be tendered at the same time, such person shall be declared the conditional purchaser.' By these words it has been contended that his purchase becomes complete before the month, that is to say, at the moment of selection, and that subsequent non-compliance with the condition as to residence renders the selection liable to forfeiture only at the instance of the Government. But it will be observed, that he is to be declared at the time of his selection, not the 'purchaser,' but the 'conditional purchaser,' that is to say, a purchaser provided certain conditions are complied with. By one part of the Act he is entitled, without any person's leave, to take land by expressing in writing to a particular officer an intention so to take it, but by another part of the Act he is told that if he does this he must go into occupation within a month. He is a purchaser only *conditionally* until that is done, and after that is done he is still a purchaser only conditionally until a certain time expires and certain things are proved to have been done by him. These other things are set forth, not in direct terms but by implication, in the 18th section of the Act. At the expiration of three years he must pay the balance of his purchase money, and tender a declaration to the effect (*inter alia*) that the land has from the date of occupation been his *bond fide* residence, and the clause concludes thus,—'But in default of a compliance with the requirements of this section, the land shall revert to her Majesty, and be liable to be sold at auction, and the deposit shall be forfeited.' It will be observed that the requirements non-compliance with which authorizes the Crown to declare a forfeiture, are the requirements of the 18th section. Among those requirements, that of occupation by the conditional purchaser within a month from the time of his selection is not included. This section, therefore, does not regulate the forfeiture for the breach of *that* condition; and unless it be held that the selection is *ipso facto* void on non-compliance with such condition within the month, there is nothing to prevent the selector making his selection and postponing his going into possession as long as he pleases. This never can have been intended by the Legislature, and is quite inconsistent with the express direction in the 16th section, that occupation must begin within the month. If it does not so begin, one of the most essential conditions of the purchase is violated, and the application and deposit go for nothing. To hold otherwise would be equivalent to a repeal of that part of the 16th section which requires this occupation to be had within the month. I am, therefore, of opinion that my direction to the jury was correct, and that this rule should be discharged.

Mr. Justice Hargrave said: "In this case a verdict has been returned for the defendant, but after a direction by his Honor that the plaintiff, before she 'could succeed in this action, was bound to prove that she occupied the land within a month from the date of the conditional purchase thereof.' The consideration of this direction also involves the larger and more important questions, whether all free-selectors are in all future trespass actions bound to prove all the other statutory requirements after a valid selection accepted by the Crown, and are to be open to actions of ejectment by the lessees of the run out of which the selection has been made; and are, in all such actions, whether trespass or ejectment, *bound to prove*, among other things, the primary fact that they 'occupied' the land selected within one month from the date of the application. When the rule was before the Court it was also pointed out, that although the present point only refers to the initiative 'occupation' by the selector within one month, under the 13th section, the decision of this Court would not only probably extend to all the other statutory conditions which the selector has to perform during the first three years, such as residence and improvements, and also to all the subsequent payments of interest and instalments of rent—which, if this direction be sound in law, the lessee could compel the selector to establish by direct testimony, and that the same direction would equally extend to all grantees or alienees from or under all the selection titles in the Colony, whether questioned in trespass by the selector or in ejectment by the squatter. There is another point of law equally important which is closely involved with the present subject, viz., whether the free-selectors of the Colony, and those claiming under them, in lawful possession of their lands, can be thus challenged in litigation by the

Form of
measurement of
portions
selected, and
reservation of
roads and water.

17. (*) Crown Lands conditionally purchased under this Act shall, if measured by the authority of the Government previously to such purchase, be taken in portions as measured, if not exceeding three hundred and twenty acres, and if unmeasured, and having frontage to any river creek road or intended road, shall if within the First Class Settled Districts have a depth of not less than twenty chains and otherwise shall have a depth of not less than sixty chains, and shall have their boundaries other than the frontages directed to the cardinal points by compass, and if having no frontages as

losses without any interference from the Crown authorities. These most important questions do not appear to have been yet decided to their full extent, except by implication. I will first refer to the well-known leading case of *Mate v. Nugent* (8, S. C. R. 246), which has always been considered and acted upon throughout the Colony as having fixed the legal position of the selector as conditional purchaser under the 13th section, whereby he receives a 'Parliamentary title' by the words of that section to an estate and interest in the specific portions of land selected, capable of passing by heirship and alienation under the Act, but always being subject to the statutory conditions, as well as being liable to forfeiture and reversion to the Crown under the 18th section in default of the fulfilment of the conditions of the Act. The selector's title thus obtained on the original application, and 'declared' to him by the 13th section as the 'conditional purchaser,' has also by sub-section 12 of section 12 of the Crown Lands Occupation Act, the further statutory operation and Legislative effect of 'cancelling' the lessee's interest *quoad* the specific portion of land selected. This 'cancelling' of the lessee's interest, and the Parliamentary title acquired by the 13th section, are both clearly established law in our Colony, and must not now be reversed or interfered with either directly or indirectly; considered together they constitute the only protection to all selectors and persons claiming under them against universal and perpetual litigation. Now that the present direction compels this Court authoritatively to fix the relative positions of squatter and selector when before a jury, either in trespass or ejectment, it seems to me that the case of *Mate v. Nugent*, and the absolute 'cancellation' of the squatter's lease by the lawful written application under the 13th section accepted by the Crown, show clearly that at least until a declared forfeiture by the Crown the selector is *not bound* to prove more than the written application and its acceptance, and that it is for the defendant to show, if he can, either an actual forfeiture or such a 'default' or conditions broken as will defeat the original application. In the second place, this view of the law seems to me most strongly supported by the very carefully considered words of the late Chief Justice (Sir Alfred Stephen): 'This Court has held in the three cases of *Mate v. Nugent*, 8, S. C. R., 246 (1869), *Chisholm v. Macauley*, 7, S. C. R. (1860), and *Emery v. Barclay*, 8, S. C. R., 380 (1869), that performance of the conditions—proved to the satisfaction of a jury in an action of trespass or otherwise—will enable a purchaser to retain the selected land, even against a subsequently issued Crown grant. It appears to me equally to follow, that where it is in like manner shown that the selector has violated those conditions, or any of them *the Crown is entitled to take advantage of the breach*, and the statutory title will then fall. Now, that is exactly what has occurred here. The *declaration of forfeiture*, if not supported by facts proved, I repeat, to the satisfaction of a jury, would avail nothing; for, as we have held, the title cannot be taken away by the erroneous decision or act of any Crown officer whatever. The declaration of forfeiture, therefore, is *in any case only so far of value, that it notifies the election* (or is itself the election) *of the Government to take advantage of the breach committed—I say supposed to have been committed; because after all has been shown, the fact of forfeiture must eventually be established if disputed in a Court of Law. For the purpose of indicating that election, however, the Gazette notification is all important. Without it, no Land Agent would be authorized to receive applications for the forfeited land, nor could any third person be assured that the Crown would enforce the forfeiture.*' These most careful expressions by Sir Alfred Stephen plainly indicate, that the late Chief Justice thought that the Crown alone 'was entitled to take advantage of the breach of conditions,' and that until forfeiture, or at least proved forfeiture, *no third person* could take advantage of any breach of conditions—'the Crown must enforce the forfeiture.' Now, although it may be strict Crown Law, that if a suit of intrusion be taken out as against a free-selector (or ejectment brought as in Queensland) by the Crown officers, and thereupon the selector put to the establishment of his title affirmatively, I have yet to learn that the selector is bound to prove, even as against the Crown, anything beyond the written application under the 13th section and its lawful acceptance by the Crown. Why should the selector, or grantee, have also the *onus probandi* of establishing that all the subsequent payments of interest, and instalments, and every other statutory detail has been complied with, even to the payment of the £1 per acre, for the ultimate grant of the fee simple; and that the grant itself shall be invalid against the Crown, and the Crown could oust the selector if he fails in any

(*) Repealed by the "Lands Acts Amendment Act of 1875," 39 Vic. No. 13.

aforesaid shall be measured in square blocks and with boundaries directed to such cardinal points: Provided that should it seem to the Minister to be expedient, the boundaries of portions having frontages may be made approximately at right-angles with the frontage and otherwise modified, and the boundaries of portions having no frontages may be modified and necessary roadways and water reserves excluded from such measurement. ⁽⁵²⁾ ⁽⁵³⁾ [For these notes, see pp. 211 and 213 respectively.]

one of such details. In my opinion, the *onus probandi* of a breach of any of these details of condition would be upon the Crown, as against the accepted application by the Crown Lands Agent; and, consequently, the *onus* would at least equally lie upon the lessee, if taken to be in the place of the Crown. Thirdly, these first and second reasons for my present judgment, are also confirmed and strengthened by the natural justice of the case and the Common Law as to Crown Lands. It is clear, from all previous decisions upon the Land Acts, that this Court, in all its decisions, equally in favour of lessees or of selectors, has always most scrupulously kept in view the elementary law that the Crown, as Crown landlord, is the root of all subsequent rights, interests, and titles, whether in lessees or selectors, and also in all sub-grantees of the fee-simple under either one or other class of initiative titles. The well-known cases of *The Attorney General v. Brown*, decided in this Court in 1846 and 1847, *The Queen v. Symonds*, before the New Zealand Court, and every other Crown Lands case in these Colonies, and before the Privy Council, down to the very recent case from Victoria, where their Lordships have confirmed Mr. Justice Molesworth's decision as to gold mines remaining in the Crown, and upon the universal application of the Common Law right of the Crown as against all subjects, unless by direct grant in express terms, have placed the present point beyond all controversy, in my mind, antecedently to the Amendment Act of 1875. And, in my opinion, the lessee of a run is, by the 12th section of the Crown Lands Occupation Act, completely denuded of his estate and interest in the land selected upon the very day that the selection is lawfully applied for under the 18th section; and if the selection be forfeited subsequently, this must, by Common Law, ensue only to the benefit of the Crown as universal Crown landlord, and the lessee must acquire from the Crown some new title to the land in question before he can trespass on the land while occupied by the selector under his original application, or set up any further right by ejectment, at least so long as the selector has not been interfered with by the Crown. Fourthly, another very leading guide to the decisions of this Court upon these Acts is, that we consider it to be our duty carefully to guard the real property of the Colony, and never needlessly to imperil or disturb the titles of free-selectors or squatters throughout the Colony; and by encouraging astute and refined construction of words or phrases of these most important statutes, which we most certainly would be doing if we were to lay down this broad rule—that the selector or grantee is bound affirmatively to prove all the details of the free selection, though long after all possible evidence may have been lost. The principle was clearly before the Privy Council in the first of the *Joachim v. O'Shanassy* cases, and also before the late Chief Justice in this Court in *Drinkwater v. Arthur*. And it needs no argument to show, that unless we strictly adhere to this principle, this Court would soon cease to administer Law and Equity with advantage to the community, and would become a great public mischief, for no man's title would be safe against oppressive litigation. Fifthly and lastly, Mr. Stephen very forcibly argued, What can be a greater grievance than to allow a lessee to come in at any time, no matter how long after selection, and compel the selector, or his subsequent alienee or grantee, to prove by affirmative evidence that his first selector, many years ago, 'occupied' the land within the first month after the date of the application, and this, too, after long acquiescence by the Crown as Crown landlord to both parties, when the selection has been improved by large expenditures, and the Crown has also all along received the annual interest or deferred payments and all subsequent instalments, or even issued the grant itself to the selector. It seems to me, however, that the strictest construction of the 12th section of the Crown Lands Occupation Act, the declaration that the 'selection' or 'application' shall 'cancel' so much of the lease as is included in the application, requires this Court now to maintain that the lessee is a mere stranger; and that all the titles of the Colony are not henceforth to be at the mercy of mere strangers as trespassers, and for all time to come. It seems to me that this can only be done, with justice to both parties, and throwing the *onus probandi* upon the lessee and not upon the selector. This judgment would scarcely be complete unless I referred to the 19th section of the 'Crown Lands Alienation Act Amendment Act of 1875,' though inapplicable to the present case. That section enacts that 'Any land which shall have reverted to her Majesty, or have become forfeited under the "Crown Lands Alienation Act of 1861" or this Act, shall thereupon, if the same be within an area under lease or promise of lease, return (together with any land held under pre-emptive lease in connection with such first-mentioned land) to the person entitled to such area by virtue of such lease or promise of lease at the time of such reverting or forfeiture, subject nevertheless to sale as by the said Act provided'. It is observable that the Legislature is here very careful to use only words of future

Conditions of
residence and
improvement ;
payment of pur-
chase money.

18. At the expiration of three years from the date of conditional purchase of any such land as aforesaid, or within three months thereafter, the balance of the purchase money shall be tendered at the office of the Colonial Treasurer, together with a declaration by the conditional purchaser, or his alienee or other person, in the opinion of the Minister, competent in that behalf under the Act ninth Victoria, number nine, to the effect that improvements, as hereinbefore defined, have been made upon such land, specifying the nature, extent, and value of such improvements, and that such land has been from the date of occupation the *bond fide* residence, either continuously of the

operation, as 'shall have reverted,' 'shall return,' &c. This new enactment has only once come under our consideration as yet, viz., in the case of *Dines v. Gordon*, as to the retrospective operation of the 14th section, under which the Minister for Lands had issued to the defendant, but after the action had commenced, in fact the day before the trial, a certificate of description, but which Mr. Justice Faucett refused to admit in evidence, in which refusal the Chief Justice and myself concurred, as not admissible as between the parties to that action. In delivering judgment the Chief Justice took a wider view than Mr. Justice Faucett or myself thought necessary for the decision of the mere point of admissibility of the certificate, and citing many important decisions of the English Courts as to the construction of statutes, such as *Fowler v. Chatterton* (6, Bing, 258), *Moon v. Darden* (2, Ezch., 22), *Pettambendass v. Thackcoorselass* (7, Moore's P. C., 239), and Lord Coke's maxim, '*Nova constitutio futuris formam imponere debet non prateritis.*' And under the authority of this construction of the 14th section, and especially of the authorities cited by the Chief Justice, applied to the 19th section of the same Act, it is perfectly clear, to my mind, that the 19th section can have no retrospective effect upon the present case. I am not, however, disposed to push the authority of *Dines v. Gordon*, as a decision, to its full extent, because the 14th section only was before the Court; but it is of great importance, as showing that the 19th and all other sections of this new enactment must not be extended beyond subsequent selections to the date of the Act. And it would be against natural justice that selections before that date should be drawn within its terms. As regards the convenience, or rather public policy in the present matter, I apprehend that there cannot be a moment's doubt, that it is the Crown alone, that is the Governor and Executive Council in each case, on public grounds alone, under the suggestion of a 'Responsible Minister,' that can so modify and enforce the *bond fide* performance of all the statutory conditions taken together, both as to time, place, and degree as against each selector as a Crown tenant, according to the real equitable intention of the Crown and selector; and I cannot impart to any decision which would thus cancel and destroy vast areas of the real property titles of the Colony, under the Crown Lands Occupation Act as well as the Alienation Act, in respect of such wretched objections as that the tent of the plaintiff was, through a mistake, a few feet outside the exact boundaries as originally described in the application, or that her sleeping on the land did not take place till a few moments after noon on the last day of the month subsequent to the application. In my opinion, assuming the plaintiff's original application to be legally valid *per se*, there was not the slightest *onus probandi* on her, as the plaintiff in an action of trespass, to prove anything further than the accepted application, in strictness of law, and that the *onus* lay upon the defendant to prove *non-occupation* by the plaintiff or breach of any other condition. As some discussion took place at the argument as to the legal meaning of the word 'occupy,' I must state that, in my opinion, the English authorities upon all cases of 'occupation' of various kinds, as for obtaining votes, rates, &c., all show that the legal meaning of the word is exactly in accordance with its derivation, viz., from '*ob*' and '*capio*,' that is, 'to take for a purpose'; such purpose must vary according to all the infinite variety of 'taking' land. In the present case, I think that the occupation was quite complete in law when the plaintiff took the land for the purposes of the Act, when paying her deposit under the 13th section to the Crown Lands Agent, and his acceptance thereof, if she went on to the land itself, even for a single hour, under the authority of the application accepted, and for the purpose of the Crown Lands Alienation Act as entitled on the accepted application; and sleeping or other evidence are not required by law. What is the 'residence' required for three years after 'occupation' within the first month is a totally different question, which does not arise upon the present rule. Although all the selectors who have hitherto entered into evidence or litigation in this country have hitherto *ex abundanti cautela*, gone on to prove 'occupation' and fulfilment of the conditions, that practice cannot help us on the present rule, because it has been granted expressly for this Court to decide what is to be the future practice according to strict law and the existing authorities; and our present decision must fix for all future time that selectors, and those claiming under them, must go beyond their written applications, and establish by evidence some 'occupation,'—that the mere production of the valid application, and payment of deposit accepted by the Land Agent, is not sufficient *prima facie* evidence of title in a selector to maintain trespass. As I think that the *non-occupation* within the month, or the breaches of any of the con-

original purchaser, or of some alienee, or successive alienee, of his whole estate and interest therein, and that no such alienation has been made by any holder thereof until after the *bond fide* residence thereon of such holder for one whole year at the least : And upon the Minister being satisfied by such declaration ~~*and the certificate of the Land Agent for the district or other proper officer~~ of the facts aforesaid, the Colonial Treasurer shall receive and acknowledge the remaining purchase money, and a grant of the fee simple, but with reservation of any minerals which the land may contain, shall be made to the then rightful owner : Provided that should such land have been

ditions, was more properly to have been required from the defendant, as against the plaintiff's legal title, after long reflection upon the authorities from *Mate v. Nugent* to the present date, and upon the general justice of this case, I regret that I cannot concur with the direction of the Chief Justice to the jury, that the plaintiff's application, as accepted by the Crown, was insufficient for a *prima facie* title. For these reasons I think there should be a new trial, as the direction as to the *onus probandi* must have prejudiced the plaintiff upon the evidence.

Sir William Manning said : " As in William Joachim's case, this action was for trespasses by the defendant on land claimed by the plaintiff as her conditional purchase under the 'Crown Lands Alienation Act of 1861,' and which had previously been in the defendant's occupation as part of his leased run under the Occupation Act of the same year. The same questions arose as in W. Joachim's case, except that this plaintiff's description of her land was not made the subject of any objection ; and, as in that case, the learned Chief Justice ruled in favour of the defendant, that the plaintiff was bound to occupy her land by way of residence within a month after purchase, and that failure in that respect *annulled the purchase and defeated the plaintiff's right of action* against this defendant. On the question of fact, whether the plaintiff had so occupied, his Honor left the issue very distinctly to the jury, and gave them the advantage of a careful examination of the evidence. The jury, however, came to a contrary conclusion from that arrived at in William Joachim's case ; and being of opinion that the plaintiff had not been in residence within the month, they gave the defendant a general verdict. In the following term we were asked for a rule to show cause why the verdict should not be set aside and a new trial granted, on various grounds ; and a rule was granted on the single question of misdirection as to occupation. Upon showing cause, the defendant's counsel, however, not only argued in favour of the ruling, but also fell back upon an independent point, to the effect that the verdict was right on the ground that *possession* was necessary at common law for the maintenance of an action of trespass, and that the plaintiff had wholly failed to show possession in any way prior to the alleged acts of trespass. 1. Upon the question as to occupation under section 16, the defendant contended, that as between parties in the relative positions of the plaintiff and himself, the obligation to occupy within the month was imperative ; and that such occupation must be by way of residence, and must also be precisely within the month and within the boundaries as described in the application and identified on the ground. Failing such occupation, he contended to the effect that the purchase must fall to the ground so absolutely and irremediably as to leave the prior pastoral lessee in the same position as if no purchase whatever had been made. Either the purchase was supposed to be inchoate only until occupation had taken place, and to become a nullity on failure to reside within the month, or in some other way such failure was to have a retroactive effect so as to extinguish the purchase *ab initio*. The contention comes to this, that upon a purchase duly made and declared, and deposit paid and accepted, under section 13 of the Act, the purchaser is not only to be subject to the expressed conditions set forth in section 18, and to forfeiture to the Crown as therein provided in the event of non-performance of those conditions to the satisfaction of the Minister for Lands, but is also to be subject, under some legal implication, to a total lapse of his purchase into the hands of the prior pastoral lessee, in case he shall fail to commence residence (although perhaps otherwise in occupation) until a day after the month—or in case a residence commenced within the time, and *bond fide* intended to be on the land should prove to have been, at however trifling a distance, outside the boundaries as ultimately ascertained. And it went to this extent, that by reason of the supposed void foundation of title, the purchase could not in such events be set up by any concession, waiver, or act of the Crown, nor by the purchaser's subsequent performance of the conditions named in section 18. And, as in William Joachim's case, the contention would seem necessarily to involve the invalidity of a grant subsequently issued to the selector upon full payment of his balance on the ground that the issue of such grant would be without any legal foundation of purchase. Reverting to the view expressed by me in that case, as to the policy of the Land Acts (as being based on broad State views for the general benefit of the country, rather than upon any desire to give special privileges to individuals which incidentally arise out of

(*) Repealed by the "Lands Acts Amendment Act of 1875," 39 Vic. No. 18.

occupied and improved as aforesaid, and should interest at the rate of five per centum per annum on the balance of the purchase money be paid within the said three months to the Colonial Treasurer, the payment of such balance may be deferred to a period within three months after the first day of January then next ensuing, and may be so deferred from year to year by payment of such interest during the first quarter of each year: But on default of a compliance with the requirements of this section the land shall revert to Her Majesty, and be liable to be sold at auction, and the deposit shall be forfeited. ⁽⁴⁶⁾ [For this note, see p. 224.]

that policy) and the principles for their interpretation, I do not hesitate to reject the defendant's proposition. The curious parenthetic form in which the only direction to 'occupy' appears, amongst other matters, in section 16, and the comparative unimportance of the matter enjoined, would alone indicate the improbability of the Legislature's having intended to assign to a failure in compliance with this requirement the fatal effect claimed for it. But it is still more to the point, to note the absence from this clause of any expressed condition of forfeiture, and to mark its contrast in this respect with section 18. As a rule, no forfeiture or lapse will arise out of a breach of obligation unless it be distinctly declared; and this rule may be regarded as absolute where a forfeiture is expressly imposed in respect of one matter, and omitted as to another. In fact, we must, in such a case, assume that the Legislature as deliberately omitted the penalty in the one instance as it expressed it in the other. Yet, in the face of these considerations, the argument here is, that the Court ought to annex by implication a penalty as serious, and, as I think, even worse, for the most literal and unintentional breach of section 16, as the statute has imposed by express words for enforcing the far more substantial requirements of section 18 in case of the Minister's dissatisfaction. We need not, however, confine ourselves exclusively to these considerations. We must also go back to section 13, under which the plaintiff was, after due application and payment, declared the conditional purchaser; and then look to the enactment in section 12 (par. 12) of the 'Crown Lands Occupation Act of 1861,' where it is enacted that 'the sale conditional or otherwise of any portion of land under lease shall cancel so much of the lease as relates to the land so sold.' From these enactments, in conjunction, I deduce that the sale to the plaintiff (being in all respects originally regular) was complete as a 'conditional sale' on its declaration as such, and that the defendant's pastoral lease was thereupon *pro tanto* cancelled; and I think that whatever consequences might or might not follow, in relation to the Crown, from any failure by the plaintiff to conform to the provision in section 16,—for an act of subsequent performance,—such failure cannot give to this defendant a right to question the purchase. The direction to occupy within the month, followed as it is by the condition in section 18 for residence during the residue of three years from the date of occupation, is of itself a matter of obviously little moment, except as fixing a date from which the condition of residence is to start. In that connection it is important; and I could understand a question whether the failure to occupy within the month might not be regarded in strictness as involving a breach of the condition of section 18. But then the result would be a forfeiture or reverter to the Crown in case the Minister should not be satisfied, and not a reinstatement of the pastoral lessee. Or, perhaps it might be contended that such failure constituted an *abandonment*; but that would imply the existence of a previously acquired estate under the purchase, and a concurrent cancellation of the defendant's lease *pro tanto*. In either of these cases the purchaser would be in the hands of the Crown, which might not think it necessary in the interests of the public rigorously to assert the letter of its rights, if satisfied that the requirements of the law and the policy of the Act had been substantially observed and carried out. It must, however, be remembered, that I am speaking of matters arising under the Act of 1861, and not under the Amending Act of 1875, which introduces, in section 19, the principle of a return of forfeited lands, or lands which may have reverted to the Crown, under the Act of 1861, to the pastoral lessee. When any question shall arise under that enactment, it will become necessary to consider how far the previous action of the Crown may be necessary for the establishment of the forfeiture or reverter under which the pastoral lessee will become re-entitled. II. On the question whether actual residence, as distinguished from other modes of occupation, is essential under section 16, I expressed during the argument an impression in the negative, and that impression is on further consideration confirmed. It is certain that the words of that section do not of themselves restrict the selector to that form of occupation; for the words 'shall occupy' may unquestionably be satisfied in a variety of ways without residence. But it was said, that inasmuch as the occupation is to be followed up under section 18 by residence from its date, it must be inferred that like residence was contemplated by section 16 also. I cannot assent to this in the aspect in which the proposition is presented. The Legislature has thought fit to use in the two clauses words which have not the same ordinary signification; and in the latter clause it has even put the words 'occupation' and 'residence' into immediate juxtaposition and contrast. Hence it appears to me, that according to one of the commonest

19. Crown Lands may be conditionally selected for the purpose of mining under section thirteen of this Act, except that in such case the price shall be forty shillings per acre, and except that in such case instead of the conditions applicable to other cases, in regard to the declaration and certificate required, a declaration shall be required only of the fact that not less than an average sum of two pounds per acre has been expended in mining operations other than gold-mining on the land: And upon such conditions being satisfied as hereby altered, and on payment of the balance of purchase money, a grant in fee simple shall be made without reservation of minerals other than gold,

Purchasers under mining conditions.

rules for the interpretation of statutes, we are bound to assume that the Legislature intentionally used a diversity of language in order to express the diversity of meaning which the language primarily conveys. It may indeed appear at first sight somewhat trifling to press a distinction between these words; inasmuch as the occupation under section 16 may be limited to one day only, and the long residence under section 18 must immediately follow. And indeed the distinction would be of no practical importance if this occupation were to be regarded merely as the *starting point of the condition of residence* under the latter section, and as being involved in the same consequences of forfeiture to the Crown and to the Crown only. But the argument of counsel, and the view taken by the learned Judge at the trial, as to the distinctive results of a failure to comply with section 16 and 18 respectively, were such as to make it necessary to read the words of each clause strictly according to their own proper significations. If non-occupation within the month is to cause an absolute and irremediable lapse in favour of a hostile claimant, and non-residence (to the satisfaction of the Minister) during the residue of three years is to create a forfeiture to the Crown which may not be harshly asserted, there are both legal and practical reasons for not confounding our interpretations of the enactments. III. Under the view I have thus expressed, as to the ruling at the trial, it would have been incumbent on me to give my voice in favour of a new trial, were I not satisfied that the defendant's cross argument is right upon the Common Law point. There can be no doubt as to the necessity for legal 'possession' in order to maintain trespass, and I think it clear also that in this case there was no evidence of possession by the plaintiff before the date of the acts of trespass complained of. I have indeed felt some difficulty as to whether it would not, nevertheless, be our duty to send the case for a new trial, lest this absence of evidence might have been occasioned by the direction to consider residence only. Certainly, the jury's finding of non-residence on the land within the month might be consistent with the fact of possession having been obtained in other ways and at some other time before the trespasses. But the plaintiff appears to have so completely exhausted all the evidence she had to give, as to leave no room for surmising that possession may have been taken in any other way, or at any other time, than as actually shown in the attempt to establish residence. There is, therefore, no ground for thinking either that the jury might have come to a different conclusion if their attention had been directed to the issue of 'possession' before trespass, or that the plaintiff could have advanced or could now produce any other evidence to prove such possession. Nor are the general features of this case such as to favour the granting of a new trial. The plaintiff was a mere instrument in the hands of her father, who was attempting by the use of her name and the names of seven others of his children to secure a large area of land within the defendant's run, and who, in carrying out that attempt, sought to comply with the letter of the law by a minimum of occupation. The father put his children in divisions to sleep in huts or tents erected at their supposed mutual corner pins; and, in attempting this narrow compliance, it might be expected that some of the children would turn out to be in wrong places, as found out by the jury to have been the case with this plaintiff; and I think, further, that this economy of occupation in the form selected for this purpose, renders it probable that nothing further was done which could be fairly construed into possession within the boundaries. To the considerations now stated for refusing a new trial, I may add the concluding reasons which I gave for not disturbing the verdict in the case of *William Joachim v. O'Shanassy*, and this further one of the same character, namely, that I think it would under the circumstances be dangerous and unfair to the defendant to send the case back for re-trial upon the question of possession, because it is a point which would give opportunities for such evidence of acts of possession as the defendant might have no opportunity of controverting if untrue. I am compelled to say that there were features in the plaintiff's evidence which prevent me from feeling entire confidence in the witnesses.

(³⁵), p. 207. The land purchased by any conditional purchaser under the "Crown Lands Alienation Act of 1861," is the land indicated by the written description contained in the application accepted by the Land Agent. The temporary boundaries taken up on the land are not ultimately binding on either the Crown or the conditional purchaser; but the Crown, without the purchaser's consent, may modify the boundaries, that is, vary them in some small degree, but not entirely change the site. The approval of the Minister is in the nature of a judicial act, and, therefore, a modification of boundaries

and the same shall be made on satisfaction of such conditions and payment of such balance, notwithstanding the period of three years required in other cases shall not have expired: And a grant may be made in like manner of any portion (not being less than forty acres) of a larger portion originally selected for purchase, upon a declaration showing an expenditure in such mining operations as aforesaid of an average sum of not less than five pounds per acre on the land so to be granted: And in that case the purchase of the remainder of the land selected shall be rescinded, and any deposit paid thereon applied in or towards satisfying the balance of purchase money of the land

once so approved of cannot be reviewed. Every free selection must, in shape and direction of boundaries, be what the statute prescribes, and if not it will not be within the protection of the statute; but if it be made correct by approved adjustment, it will then be protected. As on the one hand, a grant cannot be impeached by showing that the Minister ought not to have been satisfied on the question of occupation and improvement; so on the other hand, his not being satisfied on these points, and therefore refusing to authorize the issue of a grant, will not defeat the conditional purchaser's Parliamentary title, by due selection and purchase in the mode prescribed, followed by occupation and improvement, if all these points be established to the satisfaction of a jury. The Court were agreed in the opinion that a selection might be made by a person under twenty-one years of age, and by a father in the name of his son. Hargrave, J., who was of opinion that the rule ought to have been refused, said that if a man complied with the conditions of the Act, his title to his selection was not affected by the absence of the approval of the Minister. *Emery v. Barclay*, 8, S. C. R., 374.

Where a description was in the following words—"County of Durham, parish of Underbank, 120 acres adjoining the southern boundary line of the village reserve at Underbank," the Court by majority held that the description was insufficient, and was too vague and uncertain to be valid. *Deards v. Cornell*, S. M. H., June 5, 1876.

The statutory title of a conditional purchaser (free-selector) cannot be legally transferred so as to sustain ejectment by the transferee without a conveyance. *Fallon v. Moore*, 11, S. C. R., 314.

In 1867, R. conditionally purchased 40 acres of land, and in August, 1868, having been then more than twelve months in possession of his selection, and entitled under the "Crown Lands Alienation Act of 1861" to alienate it, mortgaged the property to J. F. There were two further charges endorsed on the mortgage, the latter of which was dated in February, 1869. The property was also transferred in the Lands Office to J. F. and stood in his name. In January, 1870, R. mortgaged the property to M., subject to other incumbrances. In April, 1871, J. F. died; and G. F. his executor and devisee in trust, in November, 1872 (the time for the final payment having expired on 1st January of that year), filed his bill against M. praying that his testator's securities might have priority, and for an account and payment or foreclosure. After the commencement of the suit, the plaintiff became aware that S. the brother-in-law of R. claimed the land, as having purchased it from R. for valuable consideration, without notice of J. F.'s securities—the conveyance being executed in November, 1869, and the bill was amended by making S. a defendant. M. did not contest the plaintiff's right of priority, and the contest was now between him and S. It appeared that the conveyance to S. was on the verbal condition that R. should be allowed to re-purchase, on paying back to S. the money advanced by him. S.'s case was supported entirely by the evidence of R. which was, that after he had given the securities to J. F., it was arranged between J. F. and himself that the land should be re-transferred in the Lands Office books to him, partly to prevent a forfeiture by reason of the non-occupation of it by J. F., and partly to enable him (R.) to borrow money from other persons. R. having, but without any written consent of J. F., procured the re-transfer of the land to his own name, executed the conveyance to S., neither the security of J. F. nor the conveyance to S. was registered at the commencement of the suit; but afterwards both were registered—the registration of the former being prior in date. It appeared also from R.'s evidence (and no other), that the receipt of the Crown Lands Agent for the deposit on his conditional purchase was handed over to him by J. F., when he gave him the original security, and that J. F. handed it back to him before he obtained the re-transfer to himself in the Lands Office books, and executed the conveyance to S. The Primary Judge dismissed the bill with costs. On appeal, decree reversed (Hargrave, J. *dissentiente*), and—*Held*, that S. would not be entitled to priority by J. F.'s giving back the deposit receipt to R., unless it was done fraudulently, or under circumstances denoting gross negligence, even if the deposit receipt were to be considered a title deed or document showing a right in the holder of it to sell or encumber the land. *Per Martin, C.J.*—The deposit receipt was not a paper the possession of which gave any apparent title to convey; the only title prior to the issue of a grant, in a case of conditional purchase under the Crown Lands Act of 1861, being the entry by the Land Agent in his book of the original selection, and the report

granted: Provided further that if the Minister shall be dissatisfied with any such declaration as aforesaid, he may cause the fact of the expenditure required to authorize a grant to be referred to arbitration under this Act, and the issue of a grant shall in that case be dependent on the award thereon.

20. (*) Crown Lands conditionally purchased under sections thirteen and fourteen of this Act, and proved to the satisfaction of the Governor and Executive Council to have been abandoned by the purchaser thereof or his legal alienee before the expiration of three years from the date of purchase, shall be declared forfeited by notice in the *Government Gazette*, and may then be sold at auction.

Sale by auction of lands abandoned by selectors.

transmitted to the proper officer of the Government under the 15th section of the Act. *Per* Faucett, J.—A deposit receipt as evidence of title is utterly worthless after the expiration of twelve months from its date. *Per* Hargrave, J.—In cases like this, Courts of Equity consider, not whether the document parted with is valid, as between the mortgagor and third parties, nor whether it has been registered or not, but only—first, whether it relates to or includes the property in dispute; secondly, whether it is in any sense produced by the mortgagor as an evidence of his present ownership in such property; thirdly, whether it was used in any way by the mortgagor to obtain advances from the second mortgagee; and fourthly, whether such user was made, and such second loan obtained, either by the express direction or with the consent of the first mortgagee, or through his wilful negligence or default in not obtaining or not retaining such document so as to prevent its being so used. *Flood v. Monash and others*, 12, S. C. R., Eq. 65.

(540), p. 207. The plaintiff's application for a conditional purchase described one of the boundaries as a line running north-easterly. On the trial of an action brought against the defendant, the lessee of a run, for trespass to the plaintiff's conditional purchase, the Chief Justice directed the jury, that inasmuch as there was no "frontage" to the plaintiff's land, a north-easterly line was one which the Act did not allow, and that his application was therefore void; and directed a verdict for the defendant. The jury found a verdict for the plaintiff. *Held* (*per* Hargrave, J., and Sir W. Manning, J., *dissentiente* Sir J. Martin, C.J.), that the direction was wrong, and that the verdict was not against the evidence. *W. Joachim v. O'Shanassy*, Knox's Term Reports: First Term, 1876, p. 98. The following are the judgments of their Honors, as reported in *S.M.H.*—

The Chief Justice said: "This was an action of trespass to land brought by the plaintiff—an infant—by his next friend, William Joachim, his father. The land in question had formed portion of the defendant's squatting run. On the 19th February, 1873, William Joachim the elder, professing to act as the plaintiff's agent, delivered to the Crown Lands Agent at Moama, in accordance with the terms of the 13th section of the 'Crown Lands Alienation Act of 1861,' a written application for the conditional purchase of 320 acres of land, which he described as follows: 'County of Cadell, parish of Moama, 320 acres, commencing at the north-east angle of the block applied for by George Joachim, thence north-easterly along the reserve for railway line 60 chains, thence west about 60 chains 50 links, thence south about 57 chains, and thence east along the northern boundary of the block applied for about 47 chains, to the commencing point.' On the same day on which William Joachim the elder delivered this written application to the Crown Lands Agent, he delivered in several more in the names of other children of his, and amongst them two in the names of his sons—Henry Bristow, and George. The south-eastern corner of Henry Bristow's selection was the starting point, by reference to which the commencing points of all the others were to be ascertained, and on which their position depended. The description of that lot was as follows: 'County of Cadell, parish of Moira or unnamed, 320 acres, commencing at a point opposite and west of the south-west angle of allotment 58, parish of Moira, and only divided therefrom by the reserve for railway line; thence north-easterly along the reserve for said railway line 60 chains; thence west about 60 chains 50 links; thence south about 57 chains; and thence east about 47 chains, to the point of commencement.' The south-west angle of allotment 58, mentioned in this description, was a fixed and easily ascertained point; and the reserve for the railway line was also fixed. It follows, therefore, that the north-western corner as well as the western boundary line of the land applied for in the name of Henry Bristow Joachim could be easily ascertained. The description of the land applied for in the name of George Joachim was in these terms: 'County of Cadell, parish of Moama, 320 acres, commencing at the south-west angle of block applied for by Henry Bristow Joachim, thence north about 57 chains, thence west about 56 chains, thence south about 57 chains, and thence east about 57 chains, to the point of commencement.' Comparing these two descriptions of George and Henry Bristow, it will seem that the eastern boundary of the former and the western boundary of the latter are one and the same line, and that the north-eastern corner of George's land is the north-western corner of Henry Bristow's. Henry Bristow's north-eastern

(*) Repealed by the "Lands Acts Amendment Act of 1875," 39 Vic. No. 13.

Additional selection of adjoining lands.

Provided.

21. Conditional purchasers of portions of Crown Lands under sections thirteen and fourteen of this Act, not exceeding two hundred and eighty acres, or their legal alienees, may make additional selection of lands adjoining to the first selection or to each other, but not otherwise, and not exceeding in the whole three hundred and twenty acres, and subject to all the conditions applicable to the original purchase except residence: Provided that in the measurement of such additional selection of lands the frontage shall not exceed the extent which would be allowed to an original selection of three hundred and twenty acres: Provided also that nothing herein contained shall prevent the sale of the adjoining lands to any other person before such further conditional purchase shall have been made.

corner is, as we have seen, 60 chains 50 links to the westward of the railway reserve. It follows, therefore, that this is the distance of George Joachim's north-eastern angle from that reserve. This angle being the commencing point of William Joachim the plaintiff's description, it is apparent that the first line which he describes as starting from that point, namely, the line 'north-easterly along the reserve for railway line 60 chains,' is an impossible line, because the commencement of it is 60 chains 50 links to westward of that line, and it therefore cannot be drawn *along* it. I pointed out this evident mistake in the description to the jury, and told them that they might regard that eastern boundary of the plaintiff's selection as a line running north-easterly, and reject that portion of the description which referred to the railway line. No question turns upon that direction now. I, however, further told the jury that inasmuch as there was no 'frontage' to the plaintiff's land, a north-easterly line was one which the Act did not allow, and that his application was therefore void; and that, consequently, as his case depended entirely upon the validity of his conditional purchase, the verdict ought to be for the defendant. To save expense to the parties, I asked the jury to find specially, as a matter of fact, whether before the expiration of the 20th March—the last day of the month from the time of lodging the written application with the Crown Lands Agent—the plaintiff had occupied any part of the land applied for by him. I further told them that the plaintiff's right to go upon the land and turn the defendant out of it, depended upon a valid selection by him, followed up by actual occupation within the month. They found, contrary to my direction, a verdict for the plaintiff; and they further found specially that the plaintiff's tent was, before the expiration of the 20th March, 1873, pitched to the west of a line running north-easterly from the north-east corner of George Joachim's land, and also to the west of a line drawn due north from that corner. A new trial is now moved for on the following grounds:—1. That the plaintiff's conditional purchase was invalid for non-compliance with the 'Crown Lands Alienation Act of 1861,' for that the eastern boundary line not being a frontage was described in the written application as a line running north-easterly. 2. That it was invalid because the land, being land without a frontage, was not described as a square with boundaries directed to the cardinal points of the compass. 3. That it was invalid, inasmuch as the written application was unintelligible and void for uncertainty. 4. That the verdict was against evidence. 5. That it was contrary to the direction of the Judge. I think, though with some hesitation, that the third ground cannot be sustained, because it appears to me now, as it appeared to me at the trial, that it was right to reject the words 'along the reserve for railway line,' and so render the description intelligible by making the north-easterly line parallel to the railway line, which I am disposed to think might properly be done. The first, second, and fifth grounds may be taken together. The determination of these grounds depends upon the construction of the 17th section of the 'Crown Lands Act of 1861,' which is as follows: 'Crown Lands conditionally purchased under this Act shall, if measured by the authority of the Government previously to such purchase, be taken in portions as measured, if not exceeding three hundred and twenty acres; and if unmeasured, and having a frontage to any river, creek, road, or intended road, shall, if within the first-class settled districts, have a depth of not less than twenty chains, and otherwise shall have a depth of not less than sixty chains, and shall have their boundaries, other than the frontages, directed to the cardinal points by compass; and, if having no frontages as aforesaid, shall be measured in square blocks and with boundaries directed to such cardinal points. Provided that should it seem to the Minister to be expedient, the boundaries of portions having frontages may be made approximately at right-angles with the frontage, and otherwise modified, and necessary roadways and water reserves excluded from such measurement.' The word 'frontage' is defined in the interpretation clause, to mean 'frontage to any road, river, stream, or watercourse, which, according to the practice of the Survey Department, ought to form a boundary between different sections or lots of land.' In the present case, the eastern boundary line of the plaintiff's selection had no frontage to any 'road, river, stream, or water-course' whatever, and there was no evidence that the 'Minister' had authorized that line to be 'made approximately at right angles' to any other line, or to be 'otherwise modified' in any way whatever. The question therefore is, if the plain directions of this section are disobeyed in the matter of the shape of the land and the direction of the

22. Holders in fee simple of lands granted by the Crown in areas not exceeding two hundred and eighty acres, who may reside on such lands, may make conditional purchases adjoining such lands the areas of which shall not with that of the lands held in fee simple exceed three hundred and twenty acres, and which shall not be subject to the condition of residence applicable to conditional purchases in other cases: Provided that nothing herein contained shall prevent the sale of the adjoining lands to any other person before such further conditional purchase shall have been made.

Additional selection of lands adjoining land already granted.

boundaries, is the conditional purchase by the plaintiff nevertheless valid? I am clearly of opinion that it is not. By the 2nd section of the Act it is enacted that, 'Any Crown lands may lawfully be granted in fee-simple, or dedicated to any public purpose, under and subject to the provisions of this Act, *but not otherwise*.' There is no power left to the Crown or to its representative to grant land to any one, except under the provisions of this enactment, none of which provisions has the Crown or its representative any authority to disregard. The right to make a 'conditional purchase' without anybody's consent, and regardless of anybody's discretion, is conceded by this Act for the first time to all the Queen's subjects; but the Legislature, when making such concession, directed that the right should be exercised in a particular manner. The Legislature said to the person about to make a conditional purchase:—'You may within certain limits take any Crown Lands, even though under lease for pastoral purposes (as provided by section 18 of the "Crown Lands Alienation Act of 1861"), but in doing so you must obey certain directions.' While the extraordinary power was given to anyone, of his own mere will, to take possession of 320 acres of Crown Lands held by another person under a valid and binding lease from the Crown, and by such taking possession *pro tanto* to cancel such lease, this power was ordered to be exercised, so far as the lengths and directions of the boundary lines were concerned, in a mode clearly and distinctly laid down. It seems to me to be beyond all doubt that this privilege can be exercised in no other way than that which has been prescribed by the authority which created it. It is no Common Law privilege. It is on the contrary a thing altogether alien to the Common Law. It is the creation of a statute; and its extent and the mode of exercising it depend altogether upon the terms of that statute, and not upon any man's discretion. The Legislature has not given to anyone the power to say that a conditional purchaser may ignore any of the provisions of the Act. The only authority in this way is that given to the 'Minister' to 'modify,' as already mentioned, and that power was not exercised in this case. To hold that a conditional purchaser can, in the absence of such modification, select his land, where it has no frontage, otherwise than as a square, or otherwise than with boundaries directed to the cardinal points of the compass, is to act in direct violation of the law. In this case the Court has no power to declare what it may conceive to be right or convenient. Its duty is to see that the directions of the statute are obeyed, and to leave to the Legislature the task of removing the restrictions which it has imposed, if those restrictions should be thought to be unwise. For these reasons I am of opinion that my direction to the jury was correct, and that the verdict, which was in opposition to it, was erroneous. I am further of opinion, that the verdict was clearly against the evidence. For the reasons which I am about to give in my judgment in the case of *Annie Joachim v. O'Shanassy*, I thought at the trial, and I still think, that a conditional purchaser who does not, within a month from the time of making his written application to the Land Agent, occupy the land so applied for, *ipso facto* avoids or vacates his purchase. It was, therefore, material for the plaintiff to prove at the trial, that before the expiration of the 20th March, 1873, he occupied the land in question in this case. William Joachim the elder was the first witness called on behalf of the plaintiff. He stated that on the 19th March, about 5 o'clock in the evening, he went on the land in question with the plaintiff, then eight years of age, his wife and seven other children, and two men. 'We pitched three tents,' he said, 'at the corner of William, George, Henry, and James's selections.' According to the descriptions given to the Land Agent, the south-west corner of James's selection was 13 chains 50 links to the east of the point where the north-east corner of George's selection coincided with the south-east corner of William's and the north-west corner of Henry's; so that it would be impossible to place the three tents at the corner of these four selections, although they might be placed near the corners of three of them, namely, George's, Henry's, and William's. One of the tents he described as William's tent, and with reference to that tent he said, 'I built William's house about 2 chains from where William's tent was'—that is to say, from where William slept on the night of the 19th March. After this evidence was given, Filgate, one of the two men who accompanied William Joachim, senior, and his family to the land on the 19th March, was examined, and he said, 'We pitched a tent that night on William Joachim's selection. I know where the house now is in which William Joachim the younger—the plaintiff—lives. The tent was about 30 yards south-west of where the house now is.' Thus, William Joachim, senior, and Filgate fix the position of the tent—the one at 2 chains (that is to say, 44 yards) from the hut afterwards built for William, and the other at about 80 yards south-west of that hut. Mr. Finlay, a

Sale by auction
of other lands.

Upset prices.

Sale by auction
of town and
suburban lands.

23. Crown Lands intended to be sold without conditions for residence and improvement shall be put up for public auction in lots not exceeding three hundred and twenty acres each, at such places in the Police District in which the lands are situated, and at such times as the Minister shall direct to be notified by advertisement in the *Gazette*, not less than one month nor more than three months before the day of sale: And the upset prices per acre shall not be lower than for Town Lands Eight pounds, Suburban Lands Two pounds, other lands One pound: Provided that the upset prices may be respectively fixed at any higher amounts.

24. Town lands and suburban lands without improvements shall be sold by public auction only.

Government surveyor, was next examined, and he described the relative positions of the various lines according to the descriptions in the original applications to the Land Agent. He saw the hut or house already spoken of, and he stated its position to be '*about 3 chains (that is, 66 yards) to the west*' of the east boundary line of the plaintiff's land, supposing that line to be drawn according to the application and parallel to the line of railway. Of course, if that line were run due north from the north-east corner of George's selection, the hut would be still further from that line. After the surveyor had given this evidence, William Joachim, sen., was recalled by plaintiff's counsel, and said, referring to the plan produced by Mr. Finlay, 'The hut is put down here correctly—very nearly; where I placed the three tents on the night of the 19th March *was over 3 chains to the west* of where the hut is now.' Having in the first instance stated this distance to be about 2 chains, after he had heard the surveyor speak of the distance of the hut from the dotted line as about 3 chains, he then says the distance was *over 3 chains*, and in cross-examination he said that it was from 3 to 4 chains. His son, John Thomas Joachim, was called immediately after this evidence was given, and he said, 'On the night of the 19th we stopped at Willy's ground; I know where Willy's hut is now; we camped on the 19th about 80 yards (3 chains and 14 yards) from where that hut is; I know where the railway reserve is; the hut is nearer by 80 yards to the railway line than the place where we slept that night.' The next witness called was James Skelly, who as well as Filgate was with the Joachims on the night of the 19th March. He said, 'I know the land, the subject matter of this action. There was a tent on it when I first knew it. There is a hut on it now. I slept for ten or twelve nights at the tent. From tent to hut might be from from 2 to 4 chains. I know the railway reserve. The hut is nearer than the tent to that reserve.' This is the whole of the evidence adduced on the part of the plaintiff to prove that within the month he occupied the land in question. Assuming that a 'north-easterly' line is the same as a line parallel to the railway, and a line such as the Act would authorize, then it appears to me, that this evidence manifestly does not warrant the finding of the jury that the plaintiff before the expiration of the 20th March occupied to the westward of that line. Still less does it support the finding that the plaintiff's tent was placed to the westward of a line running due north from his commencing point. I am therefore of opinion that on the 1st, 2nd, 4th, and the 5th grounds, the rule for a new trial ought to be made absolute."

Mr. Justice Hargrave said: "This action was tried before his Honor the Chief Justice, in May, 1875. The jury returned a verdict for the plaintiff, with damages £50. On the 14th June following a rule nisi was granted by the full Court for a new trial, or to enter a verdict for the defendant, upon the following grounds, viz.:—1. Upon the ground reserved by the Judge,—'That the alleged conditional purchase of the plaintiff is invalid for non-compliance with the "Crown Lands Alienation Act of 1861," for that the eastern boundary line (not being a "frontage") was described in the application as "a line running north-easterly".' 2. Upon the ground, also reserved by the Judge—'That the said conditional purchase was invalid for non-compliance with the said Act, for that the application did not describe the land applied for (being land without a "frontage"), as a square with the boundaries directed to the four "cardinal points of the compass"'. Besides these two points reserved by the Judge at the trial, the present rule was granted upon the three additional grounds, viz.:—3. That the alleged conditional purchase was invalid, inasmuch as the description in the written application is unintelligible and void for uncertainty. 4. That the verdict was against the evidence. 5. That the verdict was contrary to law and to the direction of his Honor.' Although, when the rule was granted, I thought there was no ground for disturbing the verdict upon any of the grounds taken in the rule, it is, perhaps, desirable that these points of law should now be fully considered and decided authoritatively, so as to prevent any future litigation against the validity of the usual forms and particulars of applications for free selections under the 13th section of the 'Crown Lands Alienation Act of 1861,' and consequently affecting the titles of all grantees under such applications, or their alienees, ever since the passing of that Act. The 1st, 2nd, and 3rd grounds of this rule relate to the form of the plaintiff's written application, which was in the following terms, from the form given in the schedule to the Act:—"I am desirous of purchasing without competition

25. Any Crown Lands put up for sale by public auction and not sold may be again put up in like manner: Provided that all lands other than town or suburban so put up and not sold shall be open for sale at the upset price, or in case of a higher price having been offered for the same, then at such higher price less in either case the deposit if any paid thereon: Provided also that the Minister may withdraw any such lands from selection and again submit them to public auction. As to lands put up and not sold.

26. A deposit of twenty-five per centum of the purchase money for all lands sold by auction under any provision of this Act shall be paid by the purchaser at the time of sale: And unless the remainder of such purchase money be paid within three months Payment of purchase money.

under the 18th section of the Crown Lands Alienation Act . . . county of Cadell, parish of Moama, 320 acres, commencing at the north-east corner of the block applied for by George Joachim, thence north-easterly along the reserve for railway line 60 chains, thence west about 60 chains 50 links, thence south about 50 chains, and thence east along the northern boundary of the block applied for by . . . about 47 chains to the commencing point.' Against the validity of that application, which was strictly within the limitations contained in the 18th section of the Act, it was gravely contended that because the subsequent 17th section required the Government surveyor, if he surveyed the land before selection, to measure off such land into blocks with their 'frontages to any river, creek, road, or intended road, or to the cardinal points by compass'—subject also to the Minister's power to modify such boundaries—therefore, the written application by the selector himself, before survey, under the 18th section, which expressly permits the application to be 'for any Crown lands not less than 40 acres, nor more than 320 acres,' shall be incorporated with the 17th section. And all these applications under the 18th section, though before survey, must be in fact surveyed, and in accordance with the detailed directions of the 17th section. As a preliminary remark, I may state that everyone who recollects the public and Parliamentary considerations of the Crown Lands Alienation Act, will remember that one of the most essential and valuable features of the *free selection system* was that 'selection was to precede survey,' the land was to be selected without waiting for any surveyor, precisely as all the pastoral runs are taken up and have always been taken up, both under the old Orders in Council and under the 'Crown Lands Occupation Act of 1861.' I am not disposed, however, to say anything further about the general policy of the Act as applicable to the question before the Court, but will rest this judgment altogether on the strictest interpretation of the 18th section according to the long established rules for construing statutes. Let us first look at the present description of the plaintiff's selection, as if no provision had been made by the Legislature for Government survey, or any other survey, under the 17th section. The first point appearing upon the plaintiff's application and description is, that it is perfectly specific *as to a known point of commencement*—'the north-east angle of George Joachim's block.' The application then goes on to describe three of the boundary lines, or west, south, and east, but describes the fourth boundary line as north-easterly along the reserve for railway line. It is said this fourth boundary line should have been 'north,' and the reserve should be disregarded, although that reserve had in fact a north-easterly direction. Two obvious consequences would follow from this construction, viz.:—First, either the results of this would have been to invalidate the whole application as including 'a portion of a reserve,' which was of course the real object of the argument. Second, if the application had excluded the triangular portion between the railway reserve and the due north line, that triangle would have been eroded altogether from being selected, because it would be triangular and not a four-sided piece of land. I will now refer to the well-known judgment of the late Chief Justice, Sir Alfred Stephen, in *Emery v. Barclay* (8, S. C. R., 381), which expressly lays down this broad general rule, which I have never heard questioned by anyone till now.—'The written application is the *guide*, although it may be looked to in connection with the actual occupation to explain what is meant by it.' Any definite fixed description is enough 'written in the application' to 'guide' all adjoining selectors and the Government surveyor when he comes to survey the selection. In the same judgment, at page 375, it appears that it was the Government surveyor, Houghton, who had adjusted the shape of the selection, and of the adjoining selections, which were approved by the Minister. At page 378, Sir Alfred Stephen says—'The grant certainly cannot be impeached by showing defects or even falsehood in the declaration.' Sir Alfred Stephen then laid down the seven following rules:—'Firstly, the land purchased by the conditional purchaser is the land indicated by the written description contained in the application accepted by the Land Agent. Secondly, the "temporary" boundaries taken up on the land are not ultimately binding on either the Crown or conditional purchaser; but *modifying the boundaries* does not entitle the Government without the selector's consent entirely to *change the site*. To *modify* or adjust can only mean to vary the boundaries in some small degree, not to place it altogether somewhere else. Thirdly, but as the land necessarily means the land applied for, not the land supposed or intended by the conditional purchaser so to be, the Government clearly can

thereafter the sale and contract shall be void, and the deposit shall be forfeited. Should the purchaser fail to pay the deposit the land shall be forthwith again put up by the agent, and who shall not accept any bid by the person so failing to pay.

Record by Land Agent.

27. Every Land Agent shall duly enter in a book, to be provided for the purpose, the particulars of all sales made by him under this Act.

Mode of appraisal or arbitration.

28. Whenever it shall become necessary or desirable to fix or ascertain any price, value, or sum of money which by this Act it is provided may be fixed or ascertained by appraisal in case of dispute as to the amount of any compensation to be made under the provisions of this Act, and in case of any matter which by this Act is

and ought to place the selection *substantially according to the description*; "modified," if necessary, according to circumstances. Fourthly, that it is not for a Government surveyor, of his own authority alone, and without confirmation by the Government, to place a free-selector on the ground or to modify the boundaries. That the modification or adjustment must, according to the statute, be by the Minister, and until he has approved of or adopted the survey in any given case it will go for nothing. Fifthly, that this approval is in the nature of a judicial act, and, therefore, a *modification* once so confirmed or approved of cannot be reviewed. In other words, one modification by the Minister is all that the statute contemplates. Sixthly, that every free selection must, in shape and direction of boundaries, be what the statute prescribes, and if not it will not be within the protection of the statute. But if it be made correct by approved adjustment, the law will then cover and protect the selection. Seventhly, that if on the one hand a grant cannot be impeached by showing that the Minister ought not to have been satisfied on the question of occupation and improvement, so on the other hand his not being satisfied on these points, and therefore refusing to authorize the issue of the grant, *will not defeat* the conditional purchaser's Parliamentary title, by due selection and purchase in the mode prescribed, followed by occupation and improvement, if all these points be established to the satisfaction of a jury.' These carefully elaborated rules, or rather considerations, from which neither I nor Mr. Justice Faucett dissented, though being worded we cannot be held to acquiesce in their exact expression, seem to me to have placed the title of all free-selectors upon the proper and legal basis under all the four stages of complete selection. These four stages are under separate sections of the Act. First, selections by written applications under the 13th section. Second, temporary boundaries under the 16th section. Third, measuring merely with frontages or to the cardinal points under the 17th section. And fourth, occupation, residence, and improvements to the satisfaction of the Minister under the 18th section. Moreover, it is obvious that all these four stages in perfecting the free selections of the whole Colony are in their very nature and form the essential circumstances of the case, perfectly separate and distinct from and indeed inapplicable to each other. Thus, the boundaries and measurements prescribed by the 16th and 17th sections, which are now by the defendant contended should be superadded to selections under the 13th sections, are altogether quite inapplicable to selectors under that section. Lastly, not only was no authority cited at the bar, but no authority can be cited for thus commingling all the 13th, 16th, 17th, and 18th sections together, and applying the terms of the later sections to the original selection already made under the 13th section. It is also clear that such a commingling of these sections would be contrary to all the rules for the construction of statutes, there being not a single word used in the 13th section to connect that section with the provisions of the subsequent sections, nor with the 17th section as to 'survey.' I think, also, it will be found that such a commingling of four sections of any Act of Parliament together into one construction is entirely without precedent or justification from any reported case or even dictum, and that such a novelty would be full of mischief and danger to the stability of any rights under every legislative enactment in our Statute Book. Upon the first and second grounds, therefore, I think the rule should be discharged, as I have already stated. I only concurred with the *rule nisi* being granted in order to have the strict legal construction of the 13th section finally and authoritatively settled; otherwise, as the late Chief Justice said in *Emery v. Barclay*, p. 376, 'every selector's grant in the Colony will be jeopardized,' if the applications in writing under the 13th section are to be subjected to the additional requirements provided for in the subsequent sections as to 'survey,' &c. As to the third ground of the rule, viz., that the application is 'void and unintelligible for uncertainty,' I am quite at a loss to discover anything unintelligible or uncertain in any of its terms or in the whole taken together. The point of commencement is given clearly enough, the north-east angle of George Joachim's block, and the dimensions of the four sides—60 chains, about 60 chains 50 links, about 50 chains, and about 47 chains—will obviously enclose an area nearly rectangular. They also seem to me to bring any surveyor back to the commencing point, or nearly thereto. If the defendant had wished to show this description void or unintelligible, he surely ought to have called some surveyor, or at least a surveyor's clerk, to swear that if he took this description as a 'guide' on the land, and placed himself at the commencing

authorized or directed to be settled by arbitration, the appraiser or appraisers, arbitrator or arbitrators, and umpire shall be appointed, and the appraisal or arbitration shall be conducted in manner hereinafter mentioned, that is to say—

- (1.) The Minister, or an officer authorized by him in that behalf, and the claimant in matters hereinbefore directed or authorized to be settled by appraisal, or the parties interested in any dispute which by the provisions of this Act may be left to arbitration may concur in the appointment of a single appraiser or arbitrator, or failing such appointment each party on the request of the

Appointment of
appraisers or
arbitrators.

point, 'the north-east angle of George Joachim's selection,' he would be unable, from the description, to survey the land professionally according to the four boundary lines—a supposition too absurd to be entertained for a moment. Upon this point I will also repeat my words from the case of *Osborne v. M'Alister* (June 16, 1875), in which I held that no rule ought to go upon the question of validity of a description,—'Quite sufficient evidence was before the jury and the Court as to the identity of the lands described with those occupied; and, where that is the case, never was such a thing known to the law as "forfeiture" for misdescription. Residence and improvement are conditions, but description is mere matter of conveyancing, and can never affect any man's title to land identified or capable of identification.' (*Bythewood's Conveyancing*, vol. 7, p. 418.) (*Long v. Collier*, 4 Russ., 267.) If the contrary were held to be law, every selector, or purchaser from a selector, would be liable to have a surveyor, either from the Crown or a mere stranger, come upon his land and say—'though you have paid your money, and complied with all the conditions, your boundaries are not properly described, and the land is not yours.' There seems to me not the slightest ground, either in law or justice, for holding any such novel and oppressive construction to be put upon the statute as against free-selectors, or against any other person holding under these statutes. With regard to the fourth ground, that the verdict is against the evidence. After perusing the Judge's notes of the evidence, I think that the evidence of William Joachim, senior, of Filgate his servant, and of J. T. Joachim, is sufficient to support the verdict, although the defendant's witnesses deposed to a great many circumstances of their own observations calculated to disprove the exact occupation of the plaintiff on the land selected within the first month. And although there was also some attempt to 'survey' the plaintiff out of his selection, still the verdict was, in my opinion, quite correct upon the direct testimony on behalf of the plaintiff, which the jury seem to have believed. It must also be remembered that all the probabilities of the case were that Mr. Joachim and his sons would be very careful to occupy within their several allotments, as they knew such occupation was essential to the legal initiation of their right to be there at all. It must also be clear that no Government surveyor can use the power to modify, so as to place a selector's boundaries outside the point occupied, merely for the sake of endangering the selection. The consideration of the 5th ground of the rule, that the verdict is against law and the direction of his Honor the Chief Justice, is involved in my previous remarks. In my opinion it is quite clear that the rule cannot be supported on any of the grounds taken; it should, therefore, be discharged with costs.

Sir William Manning said: "In this case we were asked to grant a new trial, on the ground that a special finding of the jury upon a question of fact was against the evidence; and also upon certain points of law, which from their wide-spread importance have required the fullest consideration. My opinion, after close attention to all the matters discussed before us, is that the plaintiff's verdict ought not to be disturbed. I. The special finding of the jury had relation to a contest at the trial, whether the plaintiff had, in accordance with the 'Crown Lands Alienation Act of 1861,' occupied within one month after conditional purchase, a certain selection of 320 acres made for him by his father on 20th February, 1873, and for trespassing on which by the defendant this action was brought. It had been contended for the defendant, with the approval of the presiding Judge, that unless the plaintiff had occupied his selection by way of 'residence' within its limits and within the month, his action must fail. Accordingly the plaintiff sought to prove his residence by the occupation of a tent on the night of 19th March, at a spot in the neighbourhood of, and as he alleged, just within the south-east corner; and the defendant on the other hand asserted the spot to be to the east of the proper corner pin, and therefore outside the selection. The question thus arising was complicated by a sub-inquiry whether the plaintiff's eastern boundary was to be treated, for the purpose in hand, as a line running north-easterly from his starting point as claimed in his original description, or as a line adjusted to the north cardinal point in accordance with the requirements of section 17 of the Act. Much evidence was given on both sides as to the position of the corner-pin and of the tent respectively. In summing up to the jury, the learned Chief Justice very carefully reviewed the evidence, and he asked the jury to state specially, whether they thought that the plaintiff's residence, on the 19th of March, was to the west of, that is to say, within his eastern boundary, or to the east of it. In returning their verdict for the

other shall appoint an appraiser or arbitrator as the case may require, to whom the matter shall be referred: And every such appointment shall be made by the Minister or officer and the claimant, or by the parties to the matter in dispute under their hands in writing, or if such party be a corporation aggregate under its common seal, and such appointment shall be delivered to the appraisers or arbitrators, and attached to the award, when made, and shall be deemed a submission to appraisal or to arbitration, as the case may be, by the parties making the same.

plaintiff, the jury specially said: 'We find that the plaintiff was, on the 19th of March on the ground to the west of the true eastern boundary (red line in plan) according to the application, and also to the west of a line drawn north from starting point in that description.' It is this finding which is impugned: And the question now is (according to our established rule), whether we can declare it to be 'manifestly wrong.' For my own part, I have little hesitation in stating an impression that the preponderating weight of evidence was against the finding; but, nevertheless, I cannot say that the jury were 'manifestly wrong.' There certainly was some evidence, which, if it were credited, supported the verdict; and the credit of a witness falls especially within the province of the jury to decide on. I am the more indisposed to question the finding, because it was arrived at after the full review of the evidence of which I have spoken, and in deliberate reply to a question put to the jury apart from all other matters; and because the terms of the finding itself indicate a clear comprehension of the questions for decision. I may further say that the very narrow and strict character of the point submitted for the decision of the jury would otherwise have disinclined me to interfere; it was no more than whether a spot of ground on which the plaintiff went to reside in obedience to the law, and which was *bona fide* supposed to be on his station, was precisely within his boundary, as subsequently ascertained, or a few chains outside of it; and, moreover, this narrow question had reference to the subject of occupation exactly within one month after purchase—a question which I regard as *strictissimi juris*, and which, according to the argument, involves a no less extreme penalty than the loss of the plaintiff's purchase. I may add the common grounds of expense, delay, and harassment to the parties, and the special ground that in this case the question was of a character to strain the consciences of witnesses to the utmost; and might become even more so if a re-trial were granted upon this particular pinch of the case; and especially if the faint traces of residence which a tent would leave should now have become obliterated. On these grounds, I think it far better that a first deliberate decision by a jury upon the matter should be regarded as final and conclusive. II. The question of law first raised at the trial and before us related to the *description* of the plaintiff's selection in his original application for purchase. There was no question as to the regularity of the application in other respects; or as to the payment of the deposit of 5s., or as to the plaintiff's having been duly declared by the Land Agent to be the conditional purchaser as provided by section 13 of the Act. Nor could there have been any difficulty in identifying the land as described, inasmuch as the starting point was clear, and the lines from and to it were unmistakable. But the objection was, that the boundaries claimed were—in the particulars which will presently appear—out of conformity with the requirements of section 17. The question is one which, according to my experience of the common imperfectness of descriptions by free selectors, has application to a great multitude of cases; and as it amounts to a questioning of the selectors' titles in all such cases, I shall not hesitate to go fully into my reasons for deciding against the objection. It is true that the recent enactment in section 14 of the Amending Act of 1876 has given to the Minister power under which any error may be conclusively rectified, but it is not to be supposed that those powers will have been exercised in all the cases that might come under question if the point taken in this case were not sustained. The description was as follows: 'County of Cadell, parish of Moama, 320 acres, commencing at the north-east angle of the block applied for by George Joachim, *thence north-easterly along the reserve for railway line 60 chains*, thence west about 60 chains 50 links, thence south about 57 chains, and thence east along the northern boundary applied by [*sic*, but necessarily meaning 'applied for by'] George Joachim, about 47 chains, to the commencing point.' The description was a mistaken one in respect of its eastern boundary, it being made manifest by the starting point, and the southern and other boundaries to the westward and northward of it, that the selection was not on the railway line, but was a back block 'without frontage' to the westward of a selection on that line which had previously been made for one of the plaintiff's brothers. That other selection had rightly given a north-east direction to its eastern boundary, because such was the course of the railway line which constituted a 'frontage'; and in consequence of the diagonal direction thus caused, the length of this line was 60 chains instead of about 57 chains, which would have been its length in a due north direction; and its northern and southern boundaries (being themselves directed to their cardinal points) were necessarily of the unequal lengths also stated in the plaintiff's description, so as to meet the termini of the frontage.

- (2.) After the making of any such appointment the same shall not be revoked without the consent of both parties, nor shall the death of either party operate as a revocation. Appointment not to be revoked.
- (3.) If for the space of sixty days after any such dispute or matter shall have arisen, and notice in writing by one party, who has himself duly appointed an appraiser or arbitrator to the other party, stating the dispute or matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fail to appoint an appraiser or arbitrator the appraiser or arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties. Single appraiser or arbitrator to act in certain cases.

Obviously, the brother's description had inadvertently been copied into that of the plaintiff, so far as concerned its eastern boundary and its consequent lengths of lines on that side of the block; but otherwise there could be no doubt as to the position of the block described for the plaintiff, or as to so much of it (being the great bulk of the block) as was not affected by the error. The Chief Justice ruled at the trial (in which ruling I concur), that the error was self-corrected as to the railway line being a boundary; and he therefore allowed the words 'along the reserve for railway line' to be rejected; but he considered that the residue of the error (however obviously associated with the rejected part) could not be so disposed of, and that the description must therefore be read as giving a line 'north-easterly 60 chains,' and with the north and south boundaries of the unequal lengths therein stated. The effect undoubtedly was, that the description was *partially* out of conformity with the measurements prescribed by section 17, which says, in respect of blocks without 'frontage,' that they 'shall be measured in square blocks, with their boundaries directed to the cardinal points.' And his Honor considered that the plaintiff's application was thereby wholly vitiated, and that he had consequently no right of action against the defendant. He, however, reserved the question for further consideration here; and it has now been argued before us as ground for setting aside the verdict which the plaintiff obtained in opposition to the ruling. In discussing the matter, it will first be important to see exactly how far the description is in due conformity with, and how far out of conformity with the required measurements; and with this view it will be convenient to state that the ordinary official measurement of square blocks of 320 acres gives to each line a length of 56 chains and 57 links—for which the words 'about 57 chains' in this description may be regarded as an equivalent. Now, here it will be seen that the northern, southern, and western lines are all directed to their cardinal points, and therefore adapted to the formation of a square with such direction of boundaries; and that the western boundary is of the right length for a square containing 320 acres—that is to say, 'about 57 chains.' From which last fact it follows as a mathematical sequence, that the eastern boundary must, by reason of its uniting the same parallel east and west lines, be of the same length from due north to due south. Consequently the objection is confined to the divergence of the eastern boundary line to the east of due north, and to the effect of that divergence upon its own length and upon the lengths of the north and south boundaries to reach its termini. And next, it is essential to the right appreciation of the proposition before us that we should see clearly to what it amounts when extended to its full proportions. The contention was, that the acquisition of land by way of conditional purchase from the Crown is by statute only; and that where (as is usually the case) it is in derogation of the previously vested rights of a pastoral lessee, the Act must be construed strictly against the purchaser; and consequently, that although nothing is said as to boundaries in the purchase clause, section 13, yet that the requirements of section 17 must be annexed to its provisions by implication, and must be peremptorily followed; and any departure from those requirements, although partial, must, it was said, render any application for and declaration of purchase under section 13 absolutely and wholly void *ab initio*, so as to be incapable of being set up by any subsequent matter or by any authority whatever. Accordingly, it was denied that the selector himself could correct his error by adjusting his actual occupation to regulation boundaries, or by the marking under section 16 of 'temporary boundaries' in accordance with the regulations, or by the survey of a licensed surveyor at his instance in default of a Government survey within a year, as also authorized by that section; and it was in like manner denied, that the Government could, by any official survey, adjustment, or modification, or concession, cure or waive the defect or remove its alleged fatal consequences. Hence it was further said, that as the foundation of the title was absolutely void, the selector would remain without title of any kind, even after full performance of the conditions for improvement and residence under section 18. And doubts were very consistently suggested whether the alleged void inception of title would not even vitiate a grant issued upon payment of the balance of purchase money, on the ground that grants can only be issued in accordance with the Act, and that a grant to one who had not become a purchaser in strict accordance with that Act would be *ultra vires*. And lastly, it must be observed that the right of contesting a conditional purchaser's title on this ground was claimed not to the Crown only but to any person having an interest in

Award to be binding.
In case of death of or failure to act by appraiser or arbitrator.

- (4.) The award of any appraiser or appraisers, arbitrator or arbitrators, appointed in pursuance of this Act, shall be binding, final, and conclusive upon all persons, and to all intents and purposes whatsoever.
- (5.) If before the determination of any matter so referred any appraiser or arbitrator die, or become incapable to act, the party by whom such arbitrator was appointed may appoint in writing another person in his stead; and if he fail so to do for the space of sixty days after notice in writing from the other party in that behalf, the remaining appraiser or arbitrator may proceed *ex parte*, and every appraiser or arbitrator so appointed shall have the same powers and authorities as were vested in the appraiser or arbitrator in whose stead the appointment is made.

disputing it. These extreme views appear to me opposed to the spirit of the Act and not justified by any sound interpretation of its language. As regards the principles on which the Act ought to be interpreted, my opinion is that instead of construing it rigidly against the conditional purchaser, the Court is bound to follow the policy of this Act and the contemporaneous Crown Lands Occupation Act, which most manifestly is to encourage and facilitate the settlement of the country by means of, and for the benefit incidentally of resident and improving purchasers, and to subordinate thereto the tenure of the Crown's pastoral lessees. This is a broad State policy, by which the Legislature designed to promote the general well-being and advancement of the country in directions of national importance; and under its guidance I think it our judicial duty to give effect to the beneficial purposes of the Act to the fullest extent which its language will fairly permit. And, as concerns the particular subject of *descriptions* in original applications, I think we might reasonably lean (if it were necessary) to the supposition, that as the Legislature intended to work out its policy by a class of persons who would generally be unlearned men, and very frequently out of the reach of help in framing their applications, it neither expected a perfect understanding of the Act in the way of implication from clause to clause, nor intended to require such exactness in descriptions as would stand the test of rigid and adverse legal criticism. And I further think, we may gather that Parliament did not mean to bar all possibility of remedy in respect of the errors into which they might fall, or to withhold all authority for that purpose from the Crown and its Ministers. If indeed the Legislature had contemplated such rigidity, it would, I think, have expressed its requirements in plain and unmistakable words, and would have been equally clear in indicating the penalties for non-compliance. Yet, here we are asked to adopt a rigid construction; and accordingly the foundation of the argument is, not that the section in the Crown Lands Alienation Act to which selectors are directed for their applications contains any express provisions as to the statement of boundaries or any cautionary reference to such provisions elsewhere, but that the requirements of section 17 must be annexed by judicial implication to those of section 13. And as regards the penalty for non-compliance, the argument appears to me to rest wholly upon implications of an even more remote and unsatisfactory character,—all which is opposed to the spirit in which I feel bound to read the Act. Apart, however, from such special considerations as I have hitherto mentioned, I cannot accept this proposed association of the 13th and 17th sections in the sense of creating a peremptory obligation to observe the regulations of the latter in the original application, on pain of total invalidity. Section 13 simply authorizes the purchase of 'any unoccupied Crown Land' other than town and suburban lands, &c., and not being less than 40 acres nor more than 320, and makes no reference to section 17; whilst the latter section is palpably addressed to the subject of official surveys, and the final settlement of boundaries by the authority of the Government at a time necessarily subsequent to the purchase, and is correspondingly free from any express reference to clause 13. That the character of section 17 is such as I have stated, is manifested by the immediately preceding section, in which a survey by a licensed surveyor is authorized 'in case the land shall not be surveyed by the Government within twelve months from the date of application,' and by the terms of section 17 itself, and especially by the words and the subject matters of the proviso therein. It is true that section 17 commences by saying, that lands which have been 'measured by the authority of the Government *previously* to the conditional purchase' shall be 'taken' in portions as measured; and so far it may very reasonably be read as referring to the original *taking* under section 13, not only because of the words used, but because the land having already been measured and charted may readily be described by its ascertained boundaries or by simple reference to the charted number of the block. But as regards lands not previously measured, it enacts that frontage lands 'shall have' their boundaries to the frontage with their other boundaries directed to the cardinal points; and in respect of lands without frontage, such as that now in question, the language is that they '*shall be measured*' in the form already stated. And then comes the proviso, which puts it beyond question that the Legislature was thinking only of measurements and final settlements of boundaries by the authority of the Government, seeing that it provides '*that modifications of boundaries may be made by the Minister for Lands, and necessary road-*

- (6.) In case a single arbitrator die, or become incapable to act, before the making of his award, or fail to make his award within sixty days after his appointment, or within such extended time, if any, not exceeding thirty days, as shall have been duly appointed by him for that purpose, the matters referred to him shall be again referred to appraisement or arbitration under the provisions of this Act as if no former reference had been made.
- (7.) In case there be more than one appraiser or arbitrator, the appraisers or arbitrators shall, before they enter upon the reference, appoint, by writing under their hands, an umpire, and if the person appointed to be umpire die, or become incapable to act, the appraisers or arbitrators shall forthwith appoint another person in his stead; and in case the appraisers or arbitrators neglect or refuse to appoint an umpire within thirty days after being requested so to do by any

In case of death or failure to act by a single appraiser or arbitrator.

Appraisers or arbitrators to appoint an umpire.

ways and water reserves excluded from such measurement. This being the obvious primary object of section 17 as regards unmeasured blocks, I think it would be a very violent implication to hold the applicant bound exactly to observe its provisions without hope or possibility of correction in case of error. I cannot suppose that Parliament so intended. On the contrary, the introduction of these regulations into a clause somewhat remote from section 13 (and separated from it by clauses for clearly progressive matters after purchase and before survey), and providing for final action by the Government in the way of measurement and reservations, &c., appears to me to indicate an intention to impose the duty of bringing selections into conformity with the regulations upon the Government rather than on the unlearned selector; and, at the same time, I think that these provisions, together with that as to modifications of boundaries, import that the Government was to have some power to correct the blunders which might occur in selectors' claims, and not to be a mere instrument for measuring on the ground what the selector might have rightly described on paper. It may be true that selectors were expected to observe these provisions to the best of their power; and there can be no doubt that any prudent man who knew what to do, would very carefully describe his boundaries at the outset according to the form which they must (in the absence of special grounds for modification) be ultimately made to assume. And it may be that a total disregard of the regulations for measurement might justify the entire rejection of the application by the Crown (which would thereupon, however, return the deposit, and thereby put the selector into a position for immediate re-purchase), or it might, perhaps, even vitiate the purchase altogether in relation to the prior pastoral lessee. But I am of opinion, that in a case of such *partial* nonconformity as in the present case, there is no ground for deeming the application wholly and irremediably void, either as against the Crown or the pastoral lessee. As to part of the land applied for, I hold that the plaintiff's right must be recognized by both and by this Court; and as the defendant's trespasses extended over the whole area applied for, this is enough for present purposes. The part I here allude to, is so much of the land as would be within a true square, with boundaries to the cardinal points from the starting point and along the southern boundary as described. This would give approximately some 225 acres wholly within the 320 acres as applied for and trespassed over. But further than this I am not prepared to deny the right of the Crown, in the absence of conflicting purchases, to correct the plaintiff's blunder, and to give him, if it should see fit, the whole quantity applied for. On the contrary, I incline very strongly to the opinion that it possesses the necessary authority. Not only do the provisions of section 17 appear to me to indicate, as already said, an implied grant to the Government of powers for adjustment and correction, but I think that we may derive some aid towards adopting this implication from the following matters, that is to say, from the general policy of the Act, and especially from the reference to the Minister's 'being satisfied' as to the performance of the conditions of section 18; from the position of the Crown and Government relatively to the Crown Lands and to the selector, as importing authority; from the relation of vendor and vendee, which more or less implies some power for mutual concession and adjustment; from the fact that the Crown has accepted the application and deposit, and declared the purchase in accordance with the statute; and from that regard which the tenderness of the law demands to the alleged alternative of a total loss by the conditional purchaser of the homestead he was encouraged to acquire, and of the money, time, and labour bestowed on his purchase and in performing the statutory conditions. And if I be right in assigning to the Government any powers whereby the original defect becomes *susceptible of correction*, it follows (independently of what I have said as to the plaintiff's right to a reduced square) that such an application as the plaintiff's cannot be regarded as wholly void *ab initio*. On these grounds, I hold that the objection now under consideration does not bar the plaintiff's right of action in this case. The remaining questions had reference to the obligation of a conditional purchaser, under 16 of the 'Alienation' Act, to *occupy* his land within one month of the date of purchase; and to the effect of failure therein as effecting the respective legal positions of the

party to the appraisement or arbitration, the Minister may appoint an umpire, and he is hereby empowered so to do, and the award of the umpire shall be binding, final, and conclusive upon all persons and to all intents and purposes whatsoever.

- Determination by umpire in certain cases. (8.) In case appraisers or arbitrators fail to make their award within sixty days after the day on which the last of them was appointed, or within such extended time, if any, not exceeding thirty days, as shall have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire; and the provisions of this Act with respect to the time for making an appraisement or award, and with respect to extending the same in the case of a single arbitrator shall apply to any umpirage.
- Production of documents. (9.) Any appraiser, arbitrator, or umpire, appointed by virtue of this Act may require the production of such documents in the possession or power of either party as he may think necessary for determining the matter referred, and may examine the parties as witnesses on oath.
- Determination of costs. (10.) All costs of and consequent upon the reference shall be in the discretion of the appraiser or appraisers, arbitrator or arbitrators, or of the umpire, in case the matters referred are determined by an umpire.
- Arbitration subject to rule of Supreme Court. (11.) Any submission to arbitration under the provisions of this Act may be made a rule of the Supreme Court of the said Colony on the application of any party thereto.
- Declaration by appraiser, arbitrator, or umpire. (12.) Before any appraiser, arbitrator, or umpire shall enter upon the consideration of any matter referred to him as aforesaid, he shall make out and subscribe a declaration in the form following before a Justice of the Peace, that is to say:—

I, A.B., do solemnly and sincerely declare that I am not directly or indirectly interested in the matter referred to me, and that I will faithfully, honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the "Crown Lands Alienation Act of 1861."

- Declaration to be annexed to appraisement. (13.) And such declaration shall be annexed to the appraisement or award when made, and if any appraiser, arbitrator, or umpire shall wilfully act contrary to such declaration he shall be guilty of a misdemeanor.
- Appraisement to be transmitted to Surveyor General. (14.) Every appraisement or award shall be in writing, and shall be transmitted to the Surveyor General, and deposited in his office.

Instruments under Act to be evidence. 29. Any instrument of sale or conveyance made and issued under this Act may be proved in all legal proceedings by the production of a certified copy thereof, signed by the officer to be authorized for that purpose, under any regulation made as hereinafter enacted.

Governor in Council to make and proclaim regulations. 30. The Governor, with the advice aforesaid, may make regulations for carrying this Act into full effect, so as to provide for all proceedings, forms of grants, and other instruments, and all other matters and things arising under and consistent with this Act, and not herein expressly provided for; and all such regulations shall, upon being published in the *Gazette*, be valid in law: Provided that a copy of every such regulation shall be laid before both Houses of Parliament within one month from the issue thereof if Parliament be then in Session, or otherwise within one month after the commencement of the next ensuing Session.

Short title. 31. This Act shall be styled and may be cited as the "Crown Lands Alienation Act of 1861."

plaintiff as purchaser and the defendant as prior pastoral lessee—the contention being that such occupation must be by way of residence, and that any failure to occupy to the day or within the precise boundaries would absolutely and irremediably vitiate the purchase, and be fatal to this action. These points were of course independent of the previous questions as to the description in the plaintiff's application, and were therefore subject to the assumption that the plaintiff's purchase was perfectly regular and complete in its inception under section 13. My opinion is against the defendant's contention; but as I uphold the jury's finding that there had been occupation in accordance with the ruling, it is not necessary to enter more fully upon the subject in this place. In another case (*A. Joachim v. O'Shanassy*) which also stands over for judgment, my reasons for the above opinion will be required and will be fully stated. Upon the whole of this case, it appears to me that the plaintiff acquired a title to the land by his purchase; and that according to the jury's finding of residence he sufficiently entered into occupation and possession to enable him to maintain this action; and that the rule for a new trial ought therefore to be discharged with costs.

(³⁶), p. 210. See the case *supra*, *Annie Joachim v. O'Shanassy*, set out in note (⁴⁵), p. 201.

39 Vic. No. 13. An Act to declare and amend the Laws relating to Crown Lands. [10th August, 1875.]

WHEREAS it is expedient to remove doubts which have arisen in the construction of Preamble. the "Crown Lands Alienation Act of 1861," and of the "Crown Lands Occupation Act of 1861," and to amend the said Acts in certain particulars, and to make further provisions in respect of the alienation and occupation of Crown Lands: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales, in Parliament assembled, and by the authority of the same, as follows:—

1. The sections and parts of the "Crown Lands Alienation Act of 1861" and of the Repeal. "Crown Lands Occupation Act of 1861," respectively mentioned in the Schedule to this Act, shall be and the same are hereby repealed.

PART I.

ALIENATION.

2. Upon application by the holder of any lease or promise of lease of Crown lands containing improvements made previously to the expiration of the term therein mentioned for the sale of any Crown land other than land within a proclaimed gold field, or upon application by the improver or his assigns in authorized occupation, made at any period, for the sale of improved Crown lands in proclaimed gold fields, the Governor in Council may sell and grant such lands respectively to the owners of such improvements, without competition, in fee simple, at a price, as to town and suburban lands and lands on a gold field within areas reserved from conditional sale, to be fixed by the Governor in Council, not being less than at the rate of eight pounds per acre of town lands, and two pounds ten shillings per acre of suburban lands and lands on a gold field within such reserved areas, or as regards the two latter classes of land for any portion less than an acre, and as to all other lands at a price to be fixed by appraisement not being less than one pound per acre: Provided that the price so to be fixed as aforesaid shall be exclusive of the value of the improvements in respect of which such sale is made, and provided also that improvements of value equal to the minimum auction prices of such lands respectively shall be sufficient for the purpose of the applications hereinbefore mentioned: Provided also that such sales shall be made in accordance with the general subdivision of the land whether town, suburban, or other lands, and shall embrace only allotments or portions on which improvements may stand, and that the area shall not for each improvement exceed half an acre for town land, two acres for suburban land and land on gold fields within areas reserved from conditional sale, and six hundred and forty acres for other lands: Provided also that any sales which may have been effected under the eighth section of the "Crown Lands Alienation Act of 1861" of portions exceeding two acres in virtue of improvements on gold fields, not being within such reserved areas, are hereby declared to be valid in law: Provided also that with reference to land sold within a gold field the same power of annulling such sale is hereby reserved to the Governor in Council as now exists under the fourteenth clause of the "Crown Lands Alienation Act of 1861" with regard to lands conditionally purchased.

Sales in consideration of improvements.

3. The improvement in respect of which any land may be sold and granted shall be any work or erection of a fixed character, and such as would render more beneficial the occupation and use of the said land, and which shall have been constructed, erected, placed, made, or maintained at the cost of the person applying to purchase in respect of any such improvements, or of the person or persons, either singly or continuously, through whom such applicant claims and is entitled to the land whereon are such improvements: Provided that such improvements have not at any time before been used for a like purpose.

Improvements in respect of which sales may be made.

4. No person shall be entitled under the second section of this Act to a sale or grant of lands, other than town or suburban lands or lands on a gold field, within areas reserved from conditional purchase, unless the improvements in respect of which the sale and grant is applied for shall be of the value of forty pounds or more, and shall be so situated that it shall be possible to include them within a portion or area corresponding to the value of the improvements, and measured in accordance with the regulations for the time being of the Governor in Council.

Value of improvements to entitle holder to purchase.

5. No improvements on any Crown lands shall exempt such lands from conditional sale or pre-emptive lease unless such improvements shall be of the value of forty pounds but subject thereto improvements on such lands shall be deemed sufficient for such exemption if they shall be of the value (to be determined by appraisement if disputed) of twenty shillings per acre.

Value of improvements to bar conditional purchase.

6. The word "person" in the thirteenth section of the "Crown Lands Alienation Act of 1861" shall, in respect to conditional purchases applied for and made previous to the passing of this Act, be held to mean and include any person whether under or over the age of twenty-one years, but from and after the passing of this Act such word "person" shall mean only such person of or over the age of sixteen years: Provided

Conditional purchases by minors.

always that the provision in this section as to the construction of the said word "person," in cases of such purchases before the passing of this Act, shall not be held to apply to or affect any case in which a conditional purchase by any person under the age of twenty-one years came in question, either directly, or indirectly, in any litigation pending on the sixteenth of April, one thousand eight hundred and seventy-five.

Applications for conditional purchases to be made in person.

7. Every application for a conditional purchase must be tendered in person by the applicant to the Land Agent of the district. And in every case where such applicant is under the age of twenty-one years he shall state in his application that he is of the age of sixteen years or upwards. Should such statement be proved at any time thereafter to be untrue the purchase shall become void, and the deposit forfeited.

Mode in which balance of purchase-money may be paid.

8. Where the balance of the purchase-money of any conditional purchase made after the passing of this Act is not paid at the expiration of three years from the date of such purchase, or within three months thereafter, as required by the eighteenth section of the "Crown Lands Alienation Act of 1861," the conditional purchaser or his alienee shall in lieu of the payments provided for by the said eighteenth section, pay within such period of three months after the expiration of the said term of three years to the Colonial Treasurer, or the Land Agent of the district, the sum of one shilling for each acre of such conditional purchase, and thereafter between the first day of January and the first day of April in each year pay to the said Colonial Treasurer or the Land Agent aforesaid, a like sum of one shilling per acre, until the balance, together with interest, at the rate of five per centum per annum thereon, shall have been paid, when a grant of the fee simple shall be made to the then rightful owner: Provided that if any default be made in making such payments as are herein required, the land shall become forfeited to Her Majesty, and be liable to be sold by auction, and all payments made in respect thereof shall be forfeited: Provided further, that any such conditional purchaser may between the first day of January and the first day of April in any year make two or more such payments of one shilling per acre: Provided also that any holder of a conditional purchase under the "Crown Lands Alienation Act of 1861," at the passing of this Act, may by any writing addressed to the Colonial Treasurer, or the Land Agent aforesaid, avail himself of the provisions of this clause as to payment of balance of purchase-money and interest thereon, and shall be subject to the penalties for non-payment aforesaid.

Contracts by conditional purchasers void in certain cases.

9. No person shall become the conditional purchaser of any land who is in respect of the land which he applies to purchase, or any part thereof, a servant of, or an agent or trustee for any other person, or who at the time of his application has entered into any agreement, express or implied, to permit any other person to acquire by purchase, or otherwise, the land for which he applies, but all land applied for to be conditionally purchased shall be for the *bond fide* use and benefit of the applicant in his own proper person, and not as the servant, agent, or trustee of any other person: And all contracts, agreements, and securities made, entered into, and given, with the intent of violating, or which (if the same were valid) would have the effect of violating the provisions of this section, and all contracts and agreements relating to land hereafter conditionally purchased, made or entered into before, at, or after such purchase, and to take effect wholly or in part at or after the completion of the conditions required by the eighteenth section of the "Crown Lands Alienation Act of 1861," shall be and are hereby declared to be illegal and absolutely void whether at law or in equity. And if any person shall in violation of the provisions of this section become the conditional purchaser of any land, all the right, title, and interest of the conditional purchaser or of his assignee, having notice of such violation, and all moneys paid in respect of such land, and the land itself with all improvements thereon shall on notification to that effect in the *Gazette* be absolutely forfeited, and the said land shall again become Crown lands open for conditional purchase or sale by auction as the case may be under the provisions of the "Crown Lands Alienation Act of 1861" and of this Act.

Entering into illegal contract misdemeanor.

10. Any person who shall enter into any such contract or agreement as is declared to be illegal by section nine of this Act shall be guilty of a misdemeanor, and on conviction thereof be imprisoned and kept to hard labour for any term not exceeding two years.

Owners of conditional purchase under twenty-one years of age to be liable upon contracts.

11. Any person between the ages of sixteen and twenty-one years, who, after the passing of this Act, shall become the owner of a conditional purchase, and shall whilst such owner either personally or by agent enter into any agreement for or in relation to the performance of any work or rendering of any services on such conditional purchase, or in relation thereto, or shall, being such owner as aforesaid, enter into any agreement for or in relation to the loan of money, or the sale or purchase of goods and chattels of any description whatsoever, or into any agreement connected with the occupation, management, or general purposes of such conditional purchase not contrary to this Act, shall be subject to the same liabilities and have the same rights in respect of such agreement as if he were of the full age of twenty-one years.

Temporary boundaries of

12. If at the time of conditional purchase hereafter made of any Crown land such land shall not have been surveyed by the Government, temporary boundaries thereof

commencing from some well-defined point, shall be determined by the conditional purchaser, who in every case where residence is required shall within three months from the date of application occupy the land as his *bona fide* residence. And any dispute between such purchaser and any other person other than a holder in fee or his alienee claiming any interest therein respecting such boundaries shall be settled by arbitration: Provided that if such land shall not be surveyed by the Government within twelve months from the date of application the purchaser may by notice in writing to the Land Agent for the district withdraw his application, and thereupon he shall be entitled to a refund of any deposit paid by him, or he may have the land surveyed by any licensed surveyor for the time being authorized by the Minister to make any such survey, and the expense of such survey in accordance with the scale of charges fixed, or to be fixed by the Surveyor General, shall be allowed to such purchaser as part payment of his purchase money.

land until surveyed by Government.

13. Crown lands conditionally purchased shall if measured by the authority of the Government previously to such purchase be taken in portions as measured, if not exceeding six hundred and forty acres, unless the applicant shall apply to purchase a part of such portion and shall pay the cost of the survey by way of subdivision of the same, and the Minister shall approve thereof. And no land shall be considered to be measured until the plans of the measurement shall have been approved of by the Surveyor General, of which the signature of the said Surveyor General or the officer by him deputed on such plans shall be evidence, and every conditional purchase if unmeasured, and having frontage to any river, creek, road, or intended road, shall, if within the first class settled districts, have a depth of not less than twenty chains, and otherwise shall have a depth of not less than sixty chains, and shall have the boundaries other than the frontage directed to the cardinal points, and if having no frontage as aforesaid shall be measured in a rectangular block and with boundaries directed to such cardinal points: Provided that no frontage as aforesaid and no boundary of such rectangular block shall exceed eighty chains in a direct line: Provided that should it appear to the Minister desirable the boundaries of portions having frontages may be made approximately at right angles with the frontage, and may be so applied for, and may be otherwise modified, and the boundaries of portions having no frontages may be modified and necessary roadways and water reserves may be excluded from any measurement.

Form of measurement of portions selected and reservation of roads and water.

14. No error or uncertainty in the description of land conditionally purchased, whether before or after the passing of this Act, shall vitiate the purchase in any case where the Minister is satisfied that the land occupied by the conditional purchaser is the land intended to be described in his application. And if the Minister shall at any time notify to a conditional purchaser the description of the land purchased by him, as finally approved of by such Minister, such notification shall be conclusive evidence that the land therein described is the land conditionally purchased. ⁽⁹⁷⁾

Error in description not to vitiate purchase.

15. If at any time it shall be deemed expedient to proclaim a public road through any land conditionally purchased, it shall be lawful for the Governor in Council, by advertisement in the *Gazette*, to resume so much of the land as may be required for the purpose as such public road: Provided that the conditional purchaser or his alienee shall receive a refund of the purchase money paid in respect of the land so resumed, as also of any amount expended thereon by way of improvements.

Roads through conditional purchase.

16. If any part of a measured portion of Crown lands measured as aforesaid by the authority of the Government shall be improved to the extent of not less than forty pounds, the residue of such measured portion, if not less than forty acres, shall for all purposes of conditional purchase, be held to be Crown lands, and as such open to conditional purchase in the same way as other Crown lands, if the Minister shall approve such purchase, and any person who shall conditionally purchase the said residue shall pay the cost of subdivision.

If part of measured portion improved, residue may be conditionally purchased.

17. Crown lands conditionally purchased, which shall be proved to the satisfaction of the Minister after inquiry before a Commissioner in the manner hereinafter provided, to have been abandoned by the purchaser or his alienee at any time after the expiration of three months from the date of application to purchase, may by the authority of the Governor in Council be declared forfeited by notice in the *Gazette*, and non-compliance with the condition of residence according to the provisions of the eighteenth section of the "Crown Lands Alienation Act of 1861," shall be held to be

Forfeiture of lands abandoned by selectors.

⁽⁹⁷⁾ Ejectment by grantee against conditional purchaser. Defendant claimed title by virtue of conditional purchase prior to issue of grant,—his application to purchase having been considered uncertain in the description of the land, he tendered his application for a certificate under the 14th section of the Crown Lands Acts Amendment Act. The certificate had been issued subsequent both to the date of grant and commencement of action; the Judge ruled that the certificate was inadmissible in evidence. *Held*, that the evidence was improperly rejected. *Held*, per Hargrave and Faucett, J.J. (Martin, C.J., *dissentiente*), that the 14th section was retrospective.—*Dineen v. Gordon*, S.C., Sept. 5, 1876.

Conditional purchase how to be inherited.

Forfeited lands to go to lessee or become "Crown lands."

Frontage in case of additional selection by conditional purchasers

Holder in fee making conditional purchase to reside three years.

Original and additional conditional purchase to be treated as one area.

Additional conditional purchases may be alienated with original conditional purchase.

Additional purchases not to be transferred until conditions observed.

Power to appoint Commissioner to inquire into charges against conditional purchasers.

an abandonment: Provided that the period of three years, within which the conditional purchaser or his legal alienee is required to effect improvements, may be held to commence from the date of the survey of the lands applied for.

18. In the event of land conditionally purchased devolving on or becoming vested in any person by testamentary disposition or operation of law, the same shall be held and enjoyed by such person as a conditional purchase subject to the provisions of the "Crown Lands Alienation Act of 1861" and this Act, save and except the condition as to residence, anything in the said or this Act to the contrary notwithstanding.

19. Any land which shall have reverted to Her Majesty, or have become forfeited under the "Crown Lands Alienation Act of 1861" or this Act, shall thereupon, if the same be within an area under lease or promise of lease, return, together with any land held under pre-emptive lease in connection with such first-mentioned land, to the person entitled to such area by virtue of such lease or promise of lease at the time of such reverting or forfeiture, subject nevertheless to sale as by the said Acts provided.

20. In the measurement of any additional selection or selections of land, the frontage to the total area shall not exceed the extent which would be allowed to an original conditional purchase made in one block of six hundred and forty acres: Provided further that the intervention of a road, not being a main road, between any land originally held and any additional selection shall not invalidate such additional selection.

21. No holder in fee simple of land who shall hereafter make any conditional purchase of adjoining lands under the twenty-second section of the "Crown Lands Alienation Act of 1861," shall be entitled to a grant in fee simple of such adjoining land, unless he shall at the time of making application have been resident for three years on the land so held in fee simple, or shall before the expiration of three years from the date of the application have resided for three years on the said land, or on the land conditionally purchased in right thereof.

22. Any land originally purchased and land purchased by way of additional selection may, for all the purposes of the eighteenth section of the "Crown Lands Alienation Act of 1861" as to residence and improvements, be held to be one holding and conditional purchase; and upon a declaration under the Act ninth Victoria number nine being made by the person then in possession of the said lands, that he or some one through whom he claims has been in continuous *bond fide* residence on any part of the said lands for three years previously to the time of making such declaration, and has improved the said lands in any part or parts to the extent of a sum equal to the aggregate of one pound per acre of the whole aggregate area of the said lands, such person shall, upon the Minister being satisfied, be held to have complied with the provisions of the said eighteenth section as to residence and improvements as to the aggregate area of such lands, and be entitled upon payment of the balance of the purchase moneys of the whole of such area to a grant in fee simple of the whole area of such lands.

23. Any conditional purchaser, not being under the age of twenty-one years, who shall have been in *bond fide* residence for one whole year on the land conditionally purchased by him, may transfer any land conditionally purchased by him by way of additional selection, together with the land in respect of which such additional selection was made, notwithstanding that such additional selection may not have been held by him for such period; and the said lands upon and after such alienation shall be held by the alienee thereof as one holding and conditional purchase for all purposes; but no alienee of any conditional purchase in respect of which the full term of residence shall not have been completed may so transfer until he shall have been in *bond fide* residence on the same for one whole year: Provided that all alienations of conditional purchases and additional selections shall be duly notified to the Land Agent of the district, who shall register in a book to be kept by him for such purpose the particulars of every alienation, and shall also forward such notice and particulars to the Minister for Lands.

24. No alienation may be made of any land conditionally purchased by way of additional selection, under the twenty-first and twenty-second sections of the "Crown Lands Alienation Act of 1861," as a separate and distinct parcel of land from the land by virtue of the possession of which such land shall have been so conditionally purchased, unless and until all the conditions and requirements of the said Act, or of this Act, have been observed and performed as to such additional selection.

25. The Governor in Council may appoint any person as a Commissioner, to whom shall in case of dispute or question, and may in every case be referred by the Minister the claim of any conditional purchaser or his alienee to a grant under the provisions of the eighteenth section of the "Crown Lands Alienation Act of 1861," or under this Act, as also every information or complaint to the Minister by any person that any conditional purchaser or his alienee is not fulfilling or has not fulfilled the conditions as to residence or improvements on the land conditionally purchased, and such Commissioner shall hear in open Court, and report to the Minister upon every such claim and information or complaint, and shall for such purpose hear any evidence adduced touching the

matters under investigation : Provided that any person, not being a duly authorized officer of the Government, who shall, by information or complaint, have occasioned any such inquiry shall prior thereto have lodged with the land agent the sum of ten pounds as security for any costs which may be awarded against him by the Commissioner; and such Commissioner shall have the same power of summoning and compelling the attendance of witnesses, and of administering oaths as are or shall be given to Justices of the Peace under any Act or Acts for the time being in force regulating proceedings on summary convictions, and the said Commissioner shall proceed in the hearing of and reporting on such matters in such manner as shall be provided by any regulations in that behalf under this Act; and every witness so summoned shall be entitled to the same allowance for travelling expenses as is provided by law for witnesses attending a District Court.

26. Adjoining portions of Crown lands conditionally purchased for the purpose of mining may, for all the purposes of the nineteenth section of the "Crown Lands Alienation Act of 1861," be held to be one holding and conditional purchase; and upon the Minister being satisfied that a sum of money equal to two pounds per acre of the aggregate area of the said lands has been expended in mining operations upon any part or parts of the said lands, or upon any adjoining lands held and used in connection therewith, the provisions of the said nineteenth section as to expenditure in mining operations shall be held to have been fulfilled in respect of the whole of such lands.

27. After the passing of this Act it shall be lawful for the lessee of any lands held under lease from the Crown for mineral purposes to purchase the same as mineral conditional purchases, notwithstanding clause thirteen of the "Crown Lands Alienation Act of 1861," and clause eleven of the "Crown Lands Occupation Act of 1861": Provided that such lands were not at the date of the application for such lease within the population areas prescribed by the first before mentioned clause.

28. The Governor may authorize the conversion of any lease of Crown land held for the purposes of mining for any metal or mineral other than gold into a mining conditional purchase under section nineteen of the "Crown Lands Alienation Act of 1861," notwithstanding that such land may be included within a reserve from sale made subsequently to the granting of such lease.

29. Not more than one selection of land shall be applied for by one person as a conditional purchase on the same day, and the maximum area of land which any person may at one time apply for, and of which he may become the conditional purchaser, together with that which he may subsequently acquire by way of additional selection, as also the maximum area of land to be sold by auction in any one lot, shall be six hundred and forty acres: Provided that nothing herein shall prevent any person who shall have fulfilled the conditions in respect to his conditional purchase, or duly alienated the same, from making another conditional purchase, or prevent any person from purchasing any number of portions of not more than six hundred and forty acres each at auction or by virtue of improvements.

30. Every person applying to have land measured for sale by public auction shall at the time of application pay into the Treasury the sum of sixpence per acre on the area so applied for, which sum shall be taken as part payment of the balance of the purchase money of the same if purchased by such applicant; but if the said land be not sold when offered at auction such sum shall be forfeited, and if it be sold to any other person the deposit shall be refunded: Provided that if the land be not offered for sale by auction within twelve months from the date of application the applicant may claim and receive a refund of his deposit.

31. If any person holding any Crown lands under a lease or promise of lease for pastoral purposes shall deliver to the Land Agent of the district an application in writing for liberty by reason and in virtue of improvements intended to be made thereon, to purchase any area of such land not exceeding six hundred and forty acres, nor less than forty acres, describing as may be required by any regulations hereunder the boundaries of the same which shall be subject to the several provisions of the "Crown Lands Alienation Act of 1861" and of this Act, and setting forth the intended improvements, and shall also at the same time pay to the Land Agent a sum of money equal to one pound per acre on the area so applied for, such land shall for the period of one year from the date of such application be held to be land lawfully contracted to be granted in fee simple, and as such not open for conditional sale by selection or by auction, and upon the completion to the satisfaction of the Minister of improvements to the value of one pound per acre on the land so applied for, a grant in fee simple of such land shall issue to the person so applying, or his legal alienee or representative, at the appraised value: Provided that if the said improvements shall not be so made twenty-five per cent. of the deposit shall be forfeited and the balance refunded, and the said land shall be and become Crown land within the meaning of the "Crown Lands Alienation Act of 1861": Provided also, that no such application to purchase as aforesaid shall be made for more than one square mile within each block of five miles square out of each lease, or a proportionate quantity out of any holding of less area.

Adjoining mineral conditional selections may be treated as one area.

Conversion of mineral leases into mineral conditional purchases within population boundaries.

Mineral leases on reserves may be converted into mineral conditional purchases.

Maximum area to be purchased to be six hundred and forty acres.

Applicant for purchase at auction to pay 6d. per acre on application.

Pre-emptive right provisionally to purchase lands intended to be improved.

Governor may reserve or dedicate land for use of Pastoral or Agricultural Associations.

32. The Governor in Council may by notice in the *Gazette* reserve or dedicate in such manner as may seem best for the public interest any Crown lands not exceeding sixty acres for the use and general purposes of Pastoral and Agricultural Associations, and upon any such notice being published in the *Gazette* such land shall become and be reserved or dedicated accordingly: Provided that an abstract of any intended reservation or dedication shall be laid before both Houses of Parliament one calendar month before such reservation or dedication is made.

PART II.

Cancellation of leases of runs or portions thereof, and pre-emptive lease to purchaser.

35. The sale conditional or otherwise of any land within any lease granted under the "Crown Lands Occupation Act of 1861," in the Second Class Settled Districts or in the Unsettled Districts, for pastoral purposes, shall cancel so much of the same as relates to the land so sold and also to three times the area thereof adjoining thereto; but as to this last-mentioned area only when and after the same shall have been duly claimed under this Act by the purchaser as a pre-emptive lease, and the rent for the same shall have been paid according to the provisions of the next following section, to which all conditions and liabilities attached to pre-emptive leases in the First Class Settled Districts shall apply; and in the case of conditional purchase, if there be no available adjoining land within such lease which a conditional purchaser can claim as for such pre-emptive lease, then the effect of his conditional purchase shall be to cancel three times the area thereof out of any adjoining land under such adjoining pastoral lease, in the manner hereinbefore described.

Application and occupation of pre-emptive leases.

36. Conditional purchasers or holders of land in fee simple who may be entitled under the "Crown Lands Occupation Act of 1861" to lease adjoining Crown land by pre-emptive right, may make application for such lease on a form to be prescribed by any regulation in that behalf for the time being, to the Land Agent of the district, the said application to be accompanied by the rent for the current year at the rate fixed by the said Act; and such applicant may upon approval by the Minister enter upon and occupy such land, or so much thereof as shall not already be held and occupied under any other pre-emptive lease: Provided that the same shall be taken occupied and held subject to the several conditions prescribed by the said Act, and to the boundaries thereof being defined as provided therein or by any regulations: And provided also, that the intervening of any road or creek shall not be a bar to the granting of such application: Provided also that such improvements as would exempt any land from conditional purchase under the "Crown Lands Alienation Act of 1861," or of this Act, shall in like manner and to the same extent exempt such land from being taken or given by way of pre-emptive lease.

PART III.

MISCELLANEOUS.

Copies of document to be evidence.

43. A copy of any application, letter, document, or instrument of any kind whatsoever relating to any conditional purchase, reservation, dedication, or right to or disposition of land under the "Crown Lands Alienation Act of 1861" or this Act, and whether of the original or of any press copy thereof, and of any endorsement or memorandum upon the same, certified by the officer having the custody thereof to be correct, shall be admissible in evidence in every case in which the original would be admissible and without proof that the person so certifying is the officer having the custody thereof, if he shall state in his certificate that he has such custody.

Penalties for trespassing on Crown lands.

44. Any person, unless lawfully claiming under any subsisting lease or license or otherwise, under the "Crown Lands Occupation Act of 1861," or under this Act, or under the Act thirty-seventh Victoria, number thirteen, or any other Act which may be passed for the better provision and regulation of mining, who shall be found occupying any Crown land or land granted, reserved, or dedicated for public purposes, either by residing or by erecting any hut or building thereon, or by clearing, digging up, or enclosing or cultivating any part thereof, or by cutting timber other than firewood not for sale thereon, or by obtaining stone therefrom or otherwise without authority from the Government, shall be liable on conviction to a penalty not exceeding five pounds for the first offence, and not exceeding ten pounds for the second offence, and not exceeding twenty pounds for the third or any subsequent offence, which penalties shall be recovered before any two or more Justices of the Peace upon the information or complaint on oath of any Commissioner of Crown Lands, or other person authorized by the Minister in that behalf: Provided that no information shall be laid for any second or subsequent offence until thirty clear days shall have elapsed from the date of the previous conviction.

Removal of boundary-mark to be a misdemeanor.

45. If any person shall wilfully obliterate, remove, or deface any boundary-mark which may have been made or erected by the authority of the Surveyor General, or by an authorized licensed surveyor, or by or under the direction of any authorized officer, arbitrators, or umpire, he shall be guilty of a misdemeanor.

46. The Governor in Council may from time to time, by a notice in the *Gazette*, proclaim and declare land districts and their limits and areas, for all the purposes of the "Crown Lands Alienation Act of 1861" and this Act, and from time to time by any such notice as aforesaid, alter and vary the limits and areas of any such districts. Power to proclaim land districts.

47. The Governor in Council may make and proclaim regulations for carrying this Act into full effect; so as to provide for all proceedings, forms of leases, and other instruments, and all other matters and things arising under and consistent with the provisions of this Act, and not herein expressly provided for: And all such regulations shall upon publication in the *Gazette* be valid in law: Provided that a copy of every such regulation shall be laid before both Houses of Parliament within one month from the issue thereof, if Parliament be then in session, or otherwise within one month after the commencement of the then next ensuing session. Governor in Council to make and proclaim regulations.

48. The words "Governor in Council" shall mean Governor with the advice of the Executive Council. Interpretation clause.

49. This Act may be styled and cited as the "Lands Acts Amendment Act of 1875." Short title.

SCHEDULE.

No. of Act.	Title of Act.	Parts repealed.
25 Vict. No. 1	An Act for regulating the Alienation of Crown Lands.....	{ The whole of sections 8, 16, 17, 20, and the following words in section 18:— "and the certificate of the Land Agent for the district or other proper officer."
25 Vict. No. 2	An Act for regulating the Occupation of Crown Lands.....	{ The whole of sections 18, 19, 30, and 33. The following portions of section 12— Division 5—the first proviso. The whole of the 9th sub-division of section 12.

MARRIAGES (COLONIAL).

28 & 29 Vic., c. 64. An Act to remove doubts respecting the validity of certain Marriages contracted in Her Majesty's possessions abroad. [29 June, 1865.]

"Whereas laws have from time to time been made by the Legislatures of divers of Her Majesty's possessions abroad for the purpose of establishing the validity of certain marriages previously contracted therein, but doubts are entertained whether such laws are in all respects effectual for the aforesaid purpose beyond the limits of such possessions: " Be it therefore enacted as follows:

Colonial laws establishing validity of marriages to have effect throughout Her Majesty's dominions.

1. Every law made or to be made by the Legislature of any such possession as aforesaid for the purpose of establishing the validity of any marriage or marriages contracted in such possession shall have and be deemed to have had, from the date of the making of such law, the same force and effect for the purpose aforesaid, within all parts of Her Majesty's dominions, as such law may have had, or may hereafter have, within the possession for which the same was made: Provided that nothing in this law contained shall give any effect or validity to any marriage unless at the time of such marriage both of the parties thereto were, according to the law of England, competent to contract the same.

Not to give effect to marriages unless parties are competent to contract marriage.

2. In this act the word "Legislature" shall include any authority competent to make laws for any of Her Majesty's possessions abroad, except the Parliament of the United Kingdom and Her Majesty in Council.

Definition of "Legislature."

REGISTRATION OF DEEDS.

6 Geo. IV. No. 22. An Act for registering Deeds and Conveyances in New South Wales and for other purposes. [16th November, 1825.](*)

[Preamble.]

All Deeds, Conveyances, and other Instruments (except Leases for less than three years) to be registered in the Supreme Court as herein directed.

And to have priority according to the date of registration.

1. That from and after the passing of this Act or Ordinance, all Deeds, Conveyances, and other Instruments in Writing (except Leases for less than three years), of and relating to or in any manner affecting any lands, tenements, or other hereditaments situated, lying, and being in New South Wales, may be entered and registered in the Office of the Supreme Court of New South Wales in the manner hereinafter directed: And further, that all such Deeds, Conveyances, and other Instruments in Writing as aforesaid, made and executed *bond fide* and for a valuable consideration, and registered in pursuance of the said Proclamation, or in conformity with the provisions of this Act or Ordinance, shall have and be allowed priority over every other Deed, Conveyance, or other Instrument in Writing—that is to say, the Deed, Conveyance, or other Instrument in Writing first registered in the Office of the Judge Advocate (if the same shall have been registered under the said Proclamation), or first registered in the Office of the Supreme Court (if the same shall be registered in conformity with this Act or Ordinance), shall have priority in respect of all lands, tenements, or other hereditaments conveyed or affected by such Deed, Conveyance, or other Instrument in Writing, over every other Deed, Conveyance, or other Instrument in Writing whatsoever and howsoever conveying, charging, or affecting the same lands, tenements, or other hereditaments: And the Deed, Conveyance, or other Instrument in Writing next registered as aforesaid *mutatis mutandis* shall have priority over every other Deed, Conveyance, or Instrument in Writing as aforesaid; and so on according to the priority of the time of registering such Deed, Conveyance, or Instrument in Writing as aforesaid.

Exceptions as to Deeds, Conveyances, and Instruments already made or which shall be hereafter made and shall be registered within certain periods.

2. Provided always, and be it further enacted and ordained, That no Deed, Conveyance, or other Instrument in Writing conveying or affecting any lands, tenements, or hereditaments in New South Wales as aforesaid, shall be subject by force of this Act or Ordinance to lose any priority to which the same might otherwise be legally entitled, if the same shall be registered in conformity with this Act within the respective times herein next limited and appointed,—that is to say, any Deed, Conveyance, or other Instrument in Writing which shall have been *already made* and executed in New South Wales, which shall be registered within one calendar month, or in Van Diemen's Land within three calendar months, or in any other parts of the world within eighteen calendar months, from the passing of this Act or Ordinance: and any Deed, Conveyance, or other Instrument in Writing, which shall be *hereafter made* and executed in New South Wales, which shall be registered within one calendar month, or in Van Diemen's Land within two calendar months, or in other parts of the world within twelve calendar months, from the making and executing of the said Deeds, Conveyances, and other Instruments in Writing, respectively,—shall have and retain such and the same priority and advantages to which such Deed or Instrument, respectively, would have been by law entitled if this Act or Ordinance had not been passed: But if such Deed, Conveyance, or other Instrument in Writing, shall be registered after the respective times limited and appointed as last aforesaid, then such Deed, Conveyance, or Instrument in Writing as aforesaid shall come under the foregoing clause of this Act, and shall have and be entitled to priority only from the time of the registration thereof as aforesaid.

Registration of Deeds, Conveyances, and Instruments, how to be made.

A Memorial with certain particulars to be written.

Reference to Schedule A.

Memorial to be verified on oath.

Officer or clerk appointed shall give a receipt for

3. [Office of Supreme Court to be the office of registration.]

4. And be it further enacted and ordained, That the registration of all Deeds, Conveyances, and other Instruments in Writing of, or relating to any lands, tenements, or hereditaments in New South Wales, shall be made in the following manner;—that is to say, a Memorial shall be written on parchment or paper, setting forth the date of such Deed or other Instrument intended to be registered, and the nature thereof; the names of all the parties and all the witnesses thereto; the lands, tenements, or hereditaments intended to be conveyed; the pecuniary or other consideration paid, in the form or to the effect mentioned in the Schedule hereto annexed marked A, or with such alterations therein as the nature and circumstance of any particular case may require; and the said Memorial shall be signed by some or one of the parties to the original Deed or Instrument, and shall be delivered into the Office of the Supreme Court of New South Wales, and verified upon the oath of some competent person, that such Memorial contains a just and true account of the several particulars therein set forth, which oath shall be made before one of the Judges, or the Registrar of the said Court; and upon the delivery and verification of any such Memorial as aforesaid, the proper officer or clerk appointed for such purpose, shall give a receipt for the same, in

(*) Repealed by 7 Vic. No. 16, see note *ante*, p. 141.

which shall be specified the certain day, hour, and time on which the same shall have been delivered in the said office, and the number of such Memorial according as the same shall be numbered in the said office.

5. And be it further enacted and ordained, That the proper officer or clerk shall, immediately after the delivery of any such Memorial into the said office, endorse on the back thereof the number thereof, and the certain time when the same shall have been received, and the name and place of abode of the witness attesting or verifying the same, and the time so endorsed shall be held, deemed, and taken to be the time of the registration of every such Deed, Conveyance, or Instrument in Writing whereof such Memorial shall be made as aforesaid; and every such Memorial so delivered in shall be numbered successively, according to the order of time in which the same shall have been delivered, and shall immediately be entered according to such number and order of time in some particular book which shall be provided and kept for such purpose in the said office; and every such book shall be open at all convenient times to the inspection of all such persons as may be desirous of searching the same.

6. And be it further enacted and ordained, That if any officer or clerk in the Office of the said Supreme Court shall neglect or omit to number and enter in manner and form herein directed any such Memorial so delivered into the said office as aforesaid, or shall make an erroneous entry thereof, he shall, for every such neglect, omission, or erroneous entry, forfeit the sum of Five Pounds to His Majesty, His Heirs and Successors, and shall be further liable in damages to the party, according to the extent of the injury thereby sustained; and if any such officer, clerk, or other person shall wilfully embezzle, raise, alter, forge, or counterfeit any such Memorial or endorsement, made thereon as aforesaid, with intent to injure or defraud any other person or persons, such officer, clerk, or other person shall be deemed guilty of felony, and being duly convicted thereof shall incur and suffer such and the like pains and penalties in the law as persons convicted of forging or counterfeiting any Deed or Will are now subject to by any Act of Parliament.

7. And be it further enacted and ordained, That it shall be lawful for any person residing in New South Wales, to deposit in the Office of the said Supreme Court, his or her last Will and Testament, under an envelope or cover, sealed with the seal of such person; and the same shall be endorsed with such person's name, and shall remain in the said office, in the custody of the Registrar of the said Court, until the decease of the testator (unless previously required to be given up by such testator) and upon the death of such person the Registrar shall examine the same, and deliver it to the executor first named therein, or other person lawfully entitled thereto, or in case of doubt to such person or persons as the Chief Justice of the said Court shall upon summary petition order and direct.

8. And whereas fines with Proclamations cannot be conveniently levied, nor common recoveries suffered in this Colony: And whereas by a certain other Proclamation of the Governor of New South Wales, bearing date the sixth day of March, in the year of our Lord one thousand eight hundred and nineteen, certain regulations were made for barring the right and title of married women to dower and other estates of freehold: And whereas it is expedient that the said last-mentioned Proclamation, so far as respects the alienation of any such right or title *bona fide* made in conformity therewith, should be confirmed, and that the want of fines and recoveries should be effectually supplied by making other Conveyances, attended with the particular forms hereinafter mentioned equivalent thereto: Be it therefore further enacted and ordained, That every Deed, Conveyance, or other Instrument in Writing, made and executed by any feme covert or married woman, of and concerning any lands, tenements, or hereditaments situated in New South Wales, and acknowledged in the form and manner appointed and directed by the said last-mentioned Proclamation of the Governor, shall be and be taken to have been valid and effectual to pass and convey all the right, title, and interest of such feme covert or married woman, to and in all such lands, tenements, or hereditaments intended to be alienated and conveyed by such Deed or other Instrument: And further, That any Deed or Deeds in due form of law made and executed by any party or parties from whom any estate, right, title, or interest, in any lands, tenements, or hereditaments situated in New South Wales, is, or may be intended to pass, and acknowledged by such party or parties, in the manner hereinafter mentioned,—that is to say, if such Deed or Deeds shall be made and executed in New South Wales, and shall be acknowledged before one of the Judges of the Supreme Court of New South Wales, or some person duly authorized for such purpose, as hereinafter provided; or, if made and executed in Van Diemen's Land, shall be acknowledged before one of the Judges of the Supreme Court of Van Diemen's Land; or, if made and executed in Great Britain or Ireland, shall be acknowledged before any Mayor or other Chief Magistrate of the city, borough, or town corporate where or near to which the person or persons making such acknowledgment shall reside,—such Deed or Deeds so acknowledged shall be as valid and effectual in the law to pass all the estate, right, title, interest, and claim of the respective parties to such Deed or Deeds, in or to all and every such lands, tenements, or hereditaments as aforesaid in such Deed or Deeds mentioned and intended to be

the same specifying the day, hour, and time of its delivery.

And shall immediately endorse on the back of such Memorial the number and the time of its delivery into the office, with other particulars.

Clerk or officer to forfeit £5 for neglect, omission, or erroneous entry:

And shall be liable in damages to the party injured.

To embezzle, erase, alter, forge, or counterfeit, such Memorial or endorsement, how punishable on conviction.

Wills under envelope and seal may be deposited in the Supreme Court until the death of the testator.

Recital of Proclamation of the Governor, bearing date 6th March, 1819, for barring the right and title of married women to dower and other estates of freehold.

Every Deed, Conveyance, or other Instrument, concerning lands and tenements, made and executed by any feme covert, or married woman, under the said Proclamation, to be held valid: Deeds made and executed in due form of law—

Acknowledged before one of the Judges of the Supreme Court of New South Wales or Van Diemen's Land, or if made in Great Britain or Ireland before Mayor or Chief Magistrate—shall be valid.

5 Vic. No. 21. An Act to amend the Act for the Registration of Deeds, and to provide for the establishment of a separate Registry for Sydney and Port Phillip respectively. [3rd January, 1842.] (*)

WHEREAS by an Act of the Governor and Council of New South Wales, passed in the sixth year of the reign of King George the Fourth, intituled, "*An Act for Registering Deeds and Conveyances in New South Wales, and for other purposes*," all memorials of deeds and other instruments relating to real property in New South Wales are required to be verified, and all acknowledgments of married women and other persons to be made and taken, before one of the Judges of the Supreme Court of New South Wales, or before the Registrar thereof or a Commissioner specially appointed for that purpose; and whereas the said provisions have, by reason of the present wide extent of the Colony of New South Wales, been found inconvenient, and the said Act requires amendment in certain other respects, and in particular it is expedient to provide for the establishment of a separate Registry Office for Sydney and for the District of Port Phillip respectively: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice of the Legislative Council thereof, That from and after the passing and publication of this Act, every memorial which by the said recited Act or by this present Act is required to be verified, and every acknowledgment by a married woman or other person which by the said recited Act is directed in certain cases to be made, may be verified and made respectively before either a Judge of the said Supreme Court or before the Registrar of the same, or within the District of Port Phillip before the Deputy Registrar or other person who may be appointed to discharge the duties of Registrar there, or before any Commissioner of the said Supreme Court appointed in any part of the Colony under this Act for those purposes (such Commissioner not being a party to the instrument nor having been employed to prepare the same); and every memorial so verified and acknowledgment so made, such acknowledgment being certified under the hand and seal of the Judge or other person taking the same, in the form or to the effect of the form set forth in the Schedule to this Act annexed marked A, shall be as valid and effectual as if the same had been verified or made and certified respectively in manner required by the said recited Act.

2. Provided always and be it enacted, That the original instrument to which any such memorial or acknowledgment relates shall be produced to the Judge or Registrar or other person before whom the same shall be verified or made as aforesaid; and in case such instrument shall appear to have been executed by any party unable to write, then such Judge, Registrar, or other person shall refuse to complete such memorial or acknowledgment by certifying the same, unless the execution by such party shall be attested by some Justice of the Peace, or Barrister, or Attorney, or Notary Public, whose attestation shall contain a certificate that the contents of such instrument were previously explained to the party so unable to write, and that the nature and effect thereof were at the time of such attestation, to the best of the belief of such Justice, or Barrister, or Attorney, or Notary Public, understood by such party.

3. [Fees to be paid on registration &c.]

4. [Fees to Registrar or Commissioners.]

5. [Registration for Port Phillip.]

6. [Limits of Port Phillip defined.]

7. [Transcripts of existing memorials to be transmitted to Port Phillip.]

8. And be it enacted, That after the passing of this Act, the receipt which by the said recited Act is directed to be given on the delivery of any memorial into the office of the Registrar of the said Supreme Court of New South Wales for registration, shall, in every case where such memorial relates to any instrument not being a will, be endorsed on the such instrument; and the Registrar, or Deputy Registrar, or other proper officer in that behalf, shall then attach his signature thereto; and every such receipt so endorsed and signed, shall, on proof of such signature, be taken and allowed as evidence of the registration of such instrument, and of the time when such registration was made.

9. And be it enacted, That where more than one instrument shall have been used or shall be used, for perfecting the same conveyance or security relating to the same lands or hereditaments, one memorial only shall be necessary, nor shall more than one memorial be deemed to have been necessary in any such case under the said recited Act at any time heretofore; and in any such memorial it shall be sufficient if the lands and hereditaments be particularised once only.

10. And be it enacted and declared, That no judgment in any action at law already recovered or to be recovered, shall bind or affect, or be deemed to have bound or affected, any lands or hereditaments in the said Colony: Provided always, that every

Memorials may be verified and acknowledgments made before a Judge, or the Registrar, or any Commissioner of the Supreme Court.

Original instrument to be produced; course to be taken if any marksman there-to.

Receipt of memorial and date of such receipt to be endorsed on the instrument to which it relates.

When two instruments are used for perfecting the same conveyance.

No judgments recovered to bind lands unless

(*) Repealed by 7 Vic. No. 16, see note *ante*, p. 141.

execution there-
on lodged with
the Sheriff.

writ of execution on any such judgment, against the lands or hereditaments of the person against whom such judgment shall be obtained, when delivered to the Sheriff of the said Colony or the Sheriff of any district thereof as the case may be, shall affect and be deemed to have bound such lands from the time of such delivery thereof in like manner as any writ of *fiery facias* now binds goods and chattels.

Deeds to take
effect according
to priority of
registration.

11. And be it enacted, That after the passing of this Act so much of the said recited Act as enacts that no deed, conveyance, or other instrument in writing, conveying or affecting any lands, tenements, or hereditaments, shall be subject to lose any priority to which the same might otherwise be legally entitled, if the same be registered in conformity with that Act within the times therein for that purpose limited, shall be and the same is hereby repealed, and that all deeds and other instruments affecting any lands or hereditaments in New South Wales or its Dependencies, which shall be executed or made after the passing of this Act, and which shall be duly registered under the provisions of this Act, shall have and take priority not according to their respective dates but according to the priority of registration thereof only: Provided always, that this section shall not extend to or affect any deed which shall be executed at any place in Europe within twelve months, or at any other place elsewhere out of New South Wales within six months after the passing of this Act.

12. [Representative of party if dead, or agent of an absent party, may sign memorial in his name.]

13. [False oaths made punishable.]

Term instru-
ment.

14. And be it enacted, That the term "instrument" hereinbefore used, shall, for the several purposes of this Act, be construed to include not only conveyances and other deeds, but also all instruments in writing whatsoever whereby real estate shall be affected or shall be intended so to be.

15. [Registrar to cause proper indexes to be made.]

As to official seal.

16. And be it enacted, That in all cases where under the said recited Act an acknowledgment is required to be certified under an official seal, the seal actually affixed to any such acknowledgment, or to any certificate thereof, shall for the purposes of the said Act be taken to be the official seal of the officer taking or certifying the same, and no evidence to prove the contrary shall be admissible in any case either at law or in equity.

Deposit of
examined copy
of any instru-
ment.

17. And be it enacted, That in all cases where, after the passing of this Act, in addition to a memorial of the instrument intended to be registered, there shall also be therewith deposited in the office of the Registrar of the said Supreme Court at Sydney, or the Deputy Registrar of the said Court at Port Phillip, as the case may be, an examined copy of such instrument at full length, certified by the oath of two credible persons, such oath having been taken before a Judge or any Commissioner appointed under this Act, or before such Registrar or Deputy Registrar, to be a true copy of the original to which the same relates, and by the oath in like manner of the attesting witness or witnesses to such original instrument, that it was duly executed by the several parties thereto, or by such of them as shall appear to have executed the same; every such original instrument, and also, in all cases where secondary evidence thereof would be receivable, every such examined copy thereof shall or lawfully may be received and given in evidence in any suit or proceeding whatsoever, without proof of its execution by the parties or any of them, whose execution shall have been so attested and certified, and as if such execution by the said parties had been proved in the ordinary manner.

Proviso as to
time of deposit,
&c.

18. Provided always and be it enacted, That in every such case as last aforesaid, such examined copy shall have been referred to in the memorial as accompanying or intended to accompany the same, and that it shall have been deposited as aforesaid within two months, or, if executed out of the said Colony, within twelve months, after the date of the instrument to which it relates, or, if executed before the passing of this Act, within six months after the passing hereof; and the day and hour of such deposit shall, immediately after receipt of such examined copy, be endorsed thereon, and also on the original instrument of which it purports to be a copy, which endorsements respectively, being signed by the said Registrar or Deputy Registrar making the same, shall, on proof of such signature, be received as conclusive evidence of the fact or facts therein stated; and every such examined copy, being consecutively numbered according to the order of its receipt, and also marked with the number of the memorial to which it relates, shall thenceforth be carefully retained by such Registrar or Deputy Registrar and preserved for future reference; and no such copy shall be received with any interlineation or erasure therein, unless the same shall be noticed in the margin opposite thereto by the signatures of the persons certifying on oath to such copy.

Facilitating pro-
duction of
examined copy
in evidence.

19. And be it enacted, That in every case where the production of any such examined copy as aforesaid, or of any memorial, shall be required for the purposes of evidence under this Act, the same shall or may be produced respectively either by the said Registrar or

any Clerk in the office of such Registrar or Deputy Registrar appointed by him for that purpose, or by leave of a Judge by any other person, upon security given to the satisfaction of such Judge for the safe keeping thereof, and for the return of the same uninjured within a reasonable time to be limited for that purpose.

20. And be it enacted, That with respect to every deed of feoffment hereafter executed, of which any such examined copy, certified as aforesaid, shall be duly deposited in the office of the said Registrar or Deputy Registrar, in manner aforesaid, the registration of the memorial referring to such copy shall operate as and be for all purposes equivalent to livery of seisin, as to the lands and hereditaments comprised in and intended to be conveyed by such deed of feoffment, the same in all respects as if there had been livery of seisin actually made and given of the same lands and hereditaments in the most valid and effectual form and manner. Effect of registration in the last-mentioned cases as to deeds of feoffment.

21. And be it enacted, That every deed or instrument of release executed after the passing of this Act shall be as effectual as if the releasing parties who shall have executed the same had also executed a lease for a year for giving effect to such release, although no such lease shall be executed; and that the recital or mention of a lease in a release, executed before the passing of this Act, shall be conclusive evidence of the execution of such lease. Recital of lease evidence of its execution.

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